THE LEGAL STATUS OF NIGERIAN WOMEN

with special reference to marriage.

by

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THE LEGAL STATUS OF NIGERIAN WOMEN
with special reference to marriage. E.E.A. Amechi

ABSTRACT

The main purpose of the research was to collect and collate the relevant evidence of the legal status of Nigerian women in marriage and family life.

The research was motivated by the relative lack of information on all aspects of women's life. Although a voluminous literature on the Nigerian peoples exists, references to women are incidental - necessary but insignificant adjuncts to discussions of and about men. No substantial legal work on Nigerian women has so far been published. It is in the absence of any comprehensive previous study of the legal status of women in marriage that the present work finds its justification.

Women's status in the three types of legally recognized marriages in Nigeria is examined in detail.

The thesis is divided into five parts. Part one, consisting of two chapters, is introductory, and covers the historical and legal background necessary for the proper appreciation of the topics discussed later.

In part two, the status of women in customary law marriage is examined. The types of marriage, dowry, and the incidents and dissolution of customary marriage are dealt with in six chapters.

The impact made on women's status by foreign forms of marriage is discussed in part three. Chapter IX covers marriage according to Islamic law, while women's status in statutory marriage in relation to the formation, incidents and dissolution of marriage forms the subject matter of chapters X and XI.

The property rights of married women are dealt with in part four. In chapter XII, women's property rights during marriage are discussed, while in chapter XIII, their rights of succession to property are examined.

Part five is the concluding part.

The research methods embraced intensive reading in the relevant libraries and archives in London and Nigeria, supplemented by six months of field-work in selected areas of Nigeria.

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OTHER COUNTRIES

LIST OF ABBREVIATIONS

LAW REPORTS

A.C.	Law Reports; Appeal Cases
All E.R.	All England Law Reports
All N.L.R.	All Nigerian Law Reports
Car. and Kir.	Carrington and Kirwan Reports
C.C.H.C.J.	Selected Judgements of the High Court of Lagos (Cyclostyled)
Cl. and F.	Clark and Finnelly
Cr. App. R.	Criminal Appeal Reports
Ea. (East)	East's Term Reports
E.C.S.L.R.	East Central State Law Reports
E.N.L.R. } E.R.N.L.R. }	Eastern Region of Nigeria Law Reports
F and F	Foster and Finlayson N.P.
Fam.	Family Law Reports
F.L.R.	Federal Law Reports
F.N.L.R.	Federal Nigeria Law Reports
F.S.C.	Federal Supreme Court Reports
G.L.R.	Ghana Law Reports
Hag. Con.	Haggard (Consistory). Ecc.
Holt, N.P.	Holt's Reports
I.A.	Law Reports: Indian Appeals
I.R.	Irish Reports
J.P.	Justice of the Peace and Local Government Review
L.J.M.C.	Law Journal Reports (Magistrates cases)
L.L.R.	Lagos Federal Territory Law Reports
L.N.	Law Notes

Law Reports (First Series)

L.R.C.P.	Common Pleas Cases
L.R.Ch. App.	Chancery Appeal Cases
L.R.H.L.	English and Irish Appeals

L.R.Eq.	Equity Cases
L.R.Ex.	Exchequer Cases
L.R.P.C.	Privy Council Appeals
L.R.P. and D.	Probate and Divorce Cases

Second Series

App. Cas.	Appeal Cases
Ch. D.	Chancery Division
C.P.D.	Common Pleas Division
P.D.	Probate Division
Q.B.D.	Queen's Bench Division

Third Series

A.C.	Appeal Cases
Ch.	Chancery Division
K.B. (Q.B.)	King's (Queen's) Bench
P.	Probate Division
L.T.	Law Times
M.N.L.R.	Mid-Western Region of Nigeria Law Reports
Moo. Ind. App.	Moore, E.F., Indian Appeal
N.A.C.	Natal Appeal Court
N.Z.L.R.	New Zealand Law Reports
N.M.L.R.	Nigeria Monthly Law Reports
N.N.L.R. N.R.N.L.R.	Northern Nigeria Law Reports
O.D.H.C.	Ondo High Court Reports
Pr. Ch.	Precedents in Chancery (Finch)
Sar. F.C.L.	Sarbah Fanti Customary Law
Sim. and St.	Simons and Stuart
St. Tr.	State Trials (Cobbett and Howell)
T.L.R.	Times Law Reports
U.I.L.R.	University of Ife Law Reports
W.A.C.A.	West African Court of Appeal Reports
W.L.R.	Weekly Law Reports
W.N.	Weekly Notes
W.N.L.R. W.R.N.L.R.	Western Region of Nigeria Law Reports
W.S.C.A.	Western State Courts of Appeal Reports

Journals

C.L.J.	Cambridge Law Journal
I.C.L.Q.	International and Comparative Law Quarterly
J.A.L.	Journal of African Law
J.H.S.N.	Journal of the Historical Society of Nigeria
J.I.C.L.	Journal of Islamic and Comparative Law
L.Q.R.	Law Quarterly Review
M.L.R.	Modern Law Review
N.L.J.	Nigerian Law Journal
Sol. J.	Solicitors Journal

PART ONE

INTRODUCTORY

Nigerian Women
Titled Igbo Women of the
Otu Odu Society

CHAPTER I

INTRODUCTION

1. The Nature and Scope of the Thesis

A. The statement of the problem

The main purpose of this study was to collect and collate the relevant evidence of the legal status of Nigerian women in relation to marriage and family life. This involved four subsidiary tasks:-

(I) to present and analyse evidence of the legal status of Nigerian women in marriage in the "traditional"[1] society;

(II) to examine the changes wrought on the traditional status of women in marriage by the impact of two world religions - Islam and Christianity - each with its peculiar laws of marriage, and mode of social conduct;

(III) to examine the effects of colonization, urbanisation, and industrialization, and the consequent changes in the traditional patterns of society;[2]

(IV) to set up criteria for the evaluation of the present legal status of Nigerian women in marriage, taking cognizance of inequalities of status vis-a-vis the position of Nigerian men, and also as compared with women in other countries;

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1. As used in this thesis, "traditional" generally refers to the historical period before 1900. Traditional institutions laws, and relationships are, however, found existing at the present time with little or no change in certain rural communities, and often underlie the pattern of living of many urban societies. Where information refers to the past only, this is indicated by the use of the past tense in the text; otherwise "traditional" includes the pattern of society still existing in most rural areas of Nigeria.

2. "Industrialization" is a term conveying in general terms the growth in a society mainly agrarian, of modern industry

- footnote continued

(V) to evaluate the status of Nigerian women according to the criteria proposed and to draw conclusions therefrom.

B. The purpose of the investigation

D. Amaury-Talbot, the wife of the administrative officer P. Amaury-Talbot, who worked in Southern Nigeria, wrote of Ibibio women of the former Eastern Region of Nigeria, in the first decade of the present century. Commenting on the "vexed question of the hour" she stated that

> "whether we sympathise with or decry the feminist movement, the fact remains that, for good or ill, a spirit of restlessness has swept over the women of the world. A stirring and quickening has come to them, rousing a consciousness of power long latent which, rightly directed, may suffice to destroy pit-falls and sweep clean those foul places which now surround the path of the poor and weak, but which, wrongly guided might lead along unlovely roads to sex antagonism and barren hate."[1]

More than fifty years later, the same "vexed question" engaged the attention of the international community, and led Janeway to remark that

> "the division of the world by sexes, challenged a century or more ago by the militants of the first

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Footnote continued from previous page:

with all its attendant circumstances and problems, economic and social, while "urbanization" may denote a diffusion of the influences of urban centres to a rural hinterland - A Dictionary of the Social Sciences. Urbanization is traditional among certain Nigerian communities, for example, the Yorubas, see William Bascom, "Urbanization Among the Yoruba". The American Journal of Sociology, 1955, No. LX, pp. 446-54. In this thesis "urbanization" implies a complex process of social change characterized by the creation of large urban centres, migration from rural areas, and the settlement of workers in towns, with a relatively higher material standard of living especially in the provision of pipe-borne water, electricity, etc., while "industrialization" is a term covering in general terms, the growth, in a society mainly agrarian, of modern industry, with all its attendant circumstances and problems, economic and social, see D.C.Coleman, "Industrialization", A Dictionary of the Social Sciences, Tavistock Publications, 1964, Akin L. Mabogunje, Urbanization in Nigeria, (London: University of London Press Ltd. 1968), pp. 33-43.

1. D. Amaury-Talbot, Woman's Mysteries of a Primitive People: The Ibibios of Southern Nigeria, (London: Frank Cass and Co. Ltd., 1915, new imp. 1968), p. 239.

> wave of feminism, still endures and what's more still prevails in spite of new attacks upon it."[1]

These are two of the many opinions on the continuation of what has unquestionably been the longest struggle (the slowest revolution?) known to mankind. The two statements may be contrasted with that made by Evans-Pritchard, the renowned anthropologist, who was convinced that the eternal question of women's inequality was no longer with us. This belief led him to make the following statement:

> "Gone also are the days of vigorous feminism and anti-feminism which formed part of that battle in which the protagonists of all so-called progressive movements and their opponents were mixed up in a general melée. Can any younger person today read Virginia Woolf's Three Guineas without wondering what could have been the cause of so much indignation? Surely, these are, as Mrs. Fawcett says in her autobiography, 'issues which are dead and gone'. The way is now cleared for a consideration of how women's position in society varies... with types of culture and social structure without having to take up the cudgels on behalf of anybody or anything."[2]

This statement smacks of male chauvinism, and demonstrates the attitude of men generally to the feminist movement. It is ironic that the lecture in which this sentiment was expressed was being delivered in honour of a leading feminist of her day.[3]

History has proved Evans-Pritchard wrong, and less than twenty years after he had sung its valediction the "question" has been resuscitated from the coma into which it had fallen due to the cataclysm of two world wars, to become one of the most important issues of the 1970s.

The importance of the study of women's position in society is evidenced by the fact that the United Nations, in response to the legitimate yearnings of women, declared 1975 as the year for all countries to join in working to promote the status of women throughout the world - "International Women's Year".

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1. Elizabeth Janeway, Man's World: Woman's Place: A Study in Social Mythology, (London: Penguin Books, 1977), p.9

2. E. E. Evans-Pritchard, The Position of Women in Primitive Societies and Other Essays in Social Anthropology, (London: Faber and Faber Ltd., 1965), p.40.

3. "The Fawcett Lecture", 1955-6 delivered on 25 October 1955, at Bedford College, University of London in honour of the memory of Mrs. Millicent Garrett Fawcett.

As in the case of women from other countries, the position of African women in marriage and the family has for more than two centuries been a topic of controversy. Basically, there are two diametrically opposite schools of thought.

The first, and perhaps more voluble school regards African women as little better than the slaves of their menfolk, especially their husbands, creatures to be bought and sold at the whim and caprice of father and husband; household drudges devoid of their own opinions, or unable to express them even if they exist.

Thus Basden, a former missionary in the service of the C.M.S. at Onitsha for seventeen years, says of the Igbo wife:

> "A wife ordinarily has no rights, either over herself or her possessions, not excluding her children. She is part and parcel of her husband's property". [1]

He makes no distinction between the position of a female slave and that of a wife for he states that

> "A woman in a state of slavery, whether by birth, capture or purchase is in a very unenviable position... Bond and free have but one characteristic in common, viz. they are the burden-bearers of the country. Women have but few rights in any circumstances, and can only hold such property as their lords permit." [2]

The protagonists of the opposite school forcibly maintain that the position of the African woman before she became the victim of colonization, with its evil influences and innovations, was an enviable and traditionally honoured one. In many cases the African woman, it is argued, traditionally possessed equal rights with African men, legal rights which remained fond dreams of their European counterparts.

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1. G.T.Basden, Among the Ibos of Nigeria, (London: Frank Cass and Co. Ltd., 1921, new imp. 1966), p.32

2. Ibid., p. 88. See also Mary H. Kingsley, West African Studies, (London: Macmillan and Co. Ltd., 1899), p.439; "the rule of a husband over his wife is likened to that of a constitutional monarch, that of a man or woman over a slave to that of an absolute monarch"; and William P. Livingstone, Mary Slessor of Calabar, 10th edition,(London: Hodder and Stoughton, 1918), p.221; "women have no proper status in the community being simply the creatures of man to be exploited and degraded - his labourer, his drudge, the carrier of his kernels and oil, the boiler of his nuts".

In spite of its erosion, this school maintains, her position continues to be an exalted one and calls for no liberation. Thus Basden's view of the Igbo woman may be directly contrasted with that of Horton who wrote in 1868:

> "Among the Egboes [Igbos] women hold a very superior rank in the social scale; they are not regarded, as among other heathen tribes, as an inferior creation and doomed to perpetual degradation, but occupy their 'rightful status in society'".[1]

Similarly, Uchendu, writing a century later, in 1965, notes:

> "The African woman regarded as a chattel of her husband, who has made a bridewealth payment on her account, is not an Igbo woman, who enjoys a high socioeconomic and legal status. She can leave her husband at will, abandon him if he becomes a thief, and summon him to a tribunal, where she will get a fair hearing. She marries in her own right and manages her trading capital and her profits as she sees fit."[2]

Thus the verbal battle has been endlessly pursued by various writers - anthropologists, lawyers, missionaries, administrative officers - and similar partisans - as to the status of African women. Most of the arguments with reference to the legal status of African women in general, and Nigerian women in particular, have been largely assertions and counter-assertions of opinions, generously spiced with sentiments. Not many are based on ascertained facts. The biblical Israelites were unable to make bricks without straw. Similarly, any scientific conclusion must be based on an examination of adequate relevant facts.

Here the student of African law is confronted with her first major difficulty - the obvious lack of material on which any valid assessment can be based. This problem is acute in the areas of African customary law.[3]

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1. James Africanus Horton, West African Countries and Peoples, 1868, with an introduction by George Shepperson (Edinburgh: Edinburgh University Press, 1969), p.156.

2. Victor C. Uchendu, The Igbo of Southeast Nigeria, (New York; Holt, Rinehart and Winston, 1965), p.87.

3. T.O. Olawale ELIAS, The Nature of African Customary Law, (Manchester: Manchester University Press, 1956, 3rd imp. 1972), p.1

The problem assumes double dimensions when the African law in question relates to a study of women. There has traditionally been a dearth of academic literature on the position of all women.

In 1955, Evans-Pritchard was unable to find any book which could be regarded as a sociological study of the status of women in modern English society.[1] McGregor[2] was emphatic that no such book existed at that time. The position has improved considerably within the last few decades, so much so that Read[3], writing in 1963 on "Women Status and Law Reform", found a "spate of literature" specifically concerned with the status of women. The fact remains, however, that there are many areas relating to women which are still virgin fields for research. This is particularly true of African women, although they too have received a share of the general upsurge of writings on women.

It is appropriate here to review the motley crowd who have contributed to writings on Nigerian women.

First in the field are the writings of travellers and explorers, who, according to Jeal[4], wrote books for public entertainment and, "while they made the public gasp with stupefaction at the hilarious absurdity, barbarity or pure nonsense of native customs", were "worse than useless for a reader wanting to discover more about the African way of life". He accused Mungo Park and others of using native customs out of context simply as extravaganzas - "vignettes of local colour to add spice to already spicy stories".

There may be more than a grain of truth in this criticism; nevertheless, these writings are important, and

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1. See Evans-Pritchard, 1965, op.cit., pp. 43-44.

2. O.R.McGregor, "The Social Position of Women in England, 1850-1914: A Biography", The British Journal of Sociology, 1955, Vol. 6,pp. 48-60 at pp. 48-50.

3. See James S. Read, "Women Status and Law Reform" in Changing Law in Developing Countries, edited by J.N.O.Anderson, (London: Allen and Unwin, 1963), pp.210-39 at p.210 Cf. Virginis Woolf, A Room of One's Own, (London: Hogarth Press, 1931), p. 63.

4. Jim Jeal, Livingstone, (London: Book Club Associates, 1973), p.41; See William Bosman, A New and Accurate Description of the Coast of Guinea, Divided into the Gold, the Slave and

cont. overleaf.

generations of students have benefitted from them. In most cases, they are the only evidence of the social life of the people at the relevant period.

Next in line were the missionaries. Their books were less dramatic, and perhaps more authentic, since in most cases they had lived in close proximity to the people over prolonged periods. The missionaries have made a vital contribution towards the elevation of women's status, especially in the field of education, and marital life, and for this reason, if for no other, their writings form a valuable contribution. Unfortunately, the importance of their contributions is often clouded by the unflagging but misdirected zeal with which they often pursued their main purpose in life - to convert the heathen African. They thought that the best way of achieving this aim was to stress and exaggerate the alleged depravity of native life. Africans were invariably described as "congenital indolent liars" whose nudity and tribal customs were barbarous and who treated their women as beasts of burden. According to Jeal:

> "even those missionaries who retained their philanthropic love for the 'noble savage', and managed to some extent to continue to love the man while hating his habits, were inevitably patronizing". [1]

The colonial administrator, of whom C.K. Meek and P. Amaury-Talbot were prototypes, also contributed to our knowledge of Nigerian women. Their efforts were sparked off belatedly by a growing appreciation in Europe of the value of a systematic study of social factors as a basis for legislative and administrative action. The projection of this conception from the domestic field into that of colonial policy resulted in a series of studies and surveys which could generally be described as fragmentary and pragmatic.

Footnote 4 continued from previous page:

the Ivory Coasts,1705,(Frank Cass & Co. Ltd., 4th edition, 1967), p. 117: "The Negroes are all without exception Crafty, Villanous, and Fraudulent, and very seldom to be trusted".

1. Jeal, Livinstone, 1973, p. 53.

The colonial administrators, in order to achieve their goal, elicited the aid of trained social anthropologists. The latter, having entered the field relatively late, made strenuous efforts to compensate for lost time by hyper-productivity.

Undoubtedly, excellent monographs on the laws and customs of the people were produced by colonial anthropologists, but much of their contribution was overshadowed by the sense of racial superiority evidenced by such emotive terms as "primitive", an ambiguous term which meant 'simple', pre-technical, exotic or strange in European eyes (implying a judgement of African societies as being somehow morally inferior). As a result of this, says Shorter, "anthropology received a bad name after political independence". [1]

Last, but by no means least, are the works of educated Nigerians in various fields.

Unfortunately, not much information about women can be gleaned from most of these writings. The information given, if any, is fragmentary, limited in scope and variable in reliability. In vital areas, information is largely non-existent, thus rendering any conclusion thereon suspect. Information on the status of women generally can only be gleaned from the scientific writings here and there of a handful of anthropologists, missionaries, and, to a lesser extent, lawyers. In most cases, the activities, rights and duties of women have been subordinated to preoccupation with the activities and affairs of the ruling oligarchy - men.

Kessler notes that "male activities which constitute the public life of the culture, are more visible to the anthropologist, and are thus more likely to be documented than the private domain in which women carry on their activities". [2]

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1. Aylward Shorter, African Culture and the Christian Church: An Introduction to Social and Pastoral Anthropology, (London: Geoffrey Chapman, 1973), p.4.

2. Evelyn Kessler, Women: An Anthropological View, (New York: Holt, Rinehart and Winston, 1976) p.9.

Ardener suggests that the reason for the lack of information on women is that "no anthropological book with women in the title sells".[1]

Whatever the reason may be for the lack of information on women, the fact remains that although a voluminous literature exists on the Nigerian peoples, references to women as such are incidental, necessary but insignificant adjuncts to the discussions of, and about men.

In the field of law, no substantial work has been published on Nigerian women. There are two articles on the legal status of Moslem women in the Northern States, which deal only with women under Islamic law.[2] There is also an unpublished dissertation on "Women's Rights in Property in Nigerian Law".[3]

It is in the absence of any comprehensive previous study of the legal status of Nigerian women in marriage, therefore, that the present work finds its justification.

C. The scope of the thesis

The focus of this study is limited to the legal status as defined below[4] of Nigerian women in marriage only. The relationships between the spouses, and to a lesser extent, the relationships between them and their families are dealt with. Not everything legal is dealt with, and other aspects of women's status, such as political, economic, educational or social, are not examined, except in so far as they are directly relevant to women's legal status in marriage.[5]

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1. Edwin Ardener, "The Problem Revisited", in Perceiving Women, edited by Shirley Ardener,(London: Malaby Press, 1975),p.20

2. See Ma'aji Asa Shani, "The Status of Muslim Women in the Northern States of Nigeria", Journal of the Centre of Islamic Legal Studies, Vol. 1, No.2,pp.39-52; and Muhammad Yahaya, "The Legal Status of Moslem Women in the Northern States of Nigeria", Journal of the Centre of Islamic Legal Studies, Vol. 1, No.2, pp. 1-38.

3. See J.O.Akande, "Women's Rights in Property in Nigerian Law", (Master's thesis, Lagos University, 1968).

4. See below p. 102.

5. See further below, p. 103.

Lowie[1] has correctly pointed out that the treatment of women in society is one thing, their legal status in that society another, while the character and extent of their labours belong to a distinct category. Whatever correlations exist between any of these aspects are empirical. Conceptually they are diverse, and, very often, diametrically opposite. For example, in Elizabethan England, married women, distinctly subordinate to men in legal rights to property[2], or in political status[3], nevertheless received considerable repect from their menfolk, especially among the upper classes.

The thesis concentrates on the legal position of women in relation to the formation, duration, dissolution and incidents of marriage. The current dispute regarding women's marital roles is analysed in terms of the traditional marital relationship, in order to discover to what extent the relationship has been changed by the introduction of new forms of marriage laws, and by social modernization. It examines in detail women's status in the three types of marriages legally recognised in Nigeria - marriages according to customary law, Islamic law, and under the Nigerian Marriage Act[4]. (or marriages recognized in Nigerian law as valid, monogamous marriages).[5]

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1. Robert H. Lowie, Primitive Society, (London: Routledge and Sons Ltd., 1921, 2nd imp. 1929), p. 178.

2. See further, Chapter XII below; see also Courtney S. Kenny, The History of the Law of England as to the Effects of Marriage on Property and on the Wife's Legal Capacity, (London: Reeves and Turner, 1879).

3. Marian Ramelson, The Petticoat Rebellion: A Century of Struggle for Women's Rights, (London: Lawrence and Wishart, 1967).

4. Throughout this thesis the word "Act" replaces "Ordinance" with reference to Federal Nigerian statutes in force in 1961, wherever the latter word was used prior to 1961; see Designation of Ordinances Act, 1961, s.2(1); No. 57 of 1961, Laws of the Federation of Nigeria.

5. Monogamous marriages contracted under the Nigerian Marriage Act, or recognized as valid marriages according to Nigerian law are referred to as "statutory marriages" throughout this thesis.

With reference to customary law marriages, attention is focussed on the marriage laws which apply to a significant proportion of the population. Laws which affect only a very small minority of Nigerian women have not been dealt with in any detail. This approach has been dictated by the impracticability of dealing with all the diverse customary laws relating to marriage which obtain in the more than two hundred and fifty communities in Nigeria.[1] Factors which influenced the choice of communities for this study are stated in detail below, in the section dealing with the research methodology employed[2], but the general aim has been primarily to state the laws which govern the majority of women in Nigeria, and which can be considered fairly representative.

Two periods are covered in this research:-

(a) from the latter half of the nineteenth century to the end of the century, i.e. 1850-1900, herein referred to as the "historic" period; and

(b) from 1 January 1900, to the present time: the modern period.

The period 1850 was chosen, because it reveals the position of women, sufficiently unadulterated by Western foreign influence, to estimate their status in the society before the advent of colonization, but yet late enough to obtain reasonably reliable and adequate oral data. Relevant data culled from earlier literature has been included.

The second period heralded profound changes as it introduced British jurisdiction, and with particular reference to the topic of this thesis, the years since 1900 introduced one of the most momentous changes - the introduction of English law and statutory marriage to other parts of the country besides Lagos and its environs, and other coastal areas.[3]

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1. See further below, pp. 78-79.

2. See below, pp. 62-66.

3. English law was introduced into some parts of the country before 1900. It was formally introduced into Lagos from 4 March 1863 by Ordinance No. 3 of 1863.

In addition to the introduction of English law and a new type of marriage, the structural transformation of the Nigerian society resulting from colonial rule, increased urbanization, industrialization, religious and educational changes, and other social factors also affected women's status.

D. Methodology

Phase One

This phase involved nine months of intensive reading in the relevant libraries in London, during which opportunity was taken to peruse books, reports, articles, documents, etc. written by travellers, missionaries, government officials, social anthropologists, lawyers, historians and others, for information relating to the status of Nigerian women.

Opportunity was also taken during this period to read all relevant reported cases decided in the Supreme Court, and the High Courts of Nigeria, which were available in the libraries in London.

Archival work in the Public Record Office in London yielded valuable information on the status of women before 1900, and during the early colonial period. The most valuable information obtained here was the correspondence between the administrators in the Gold Coast Colony (Ghana and Lagos) and the Colonial Office in London, in relation to the Gold Coast Marriage Law. The correspondence contained in C.O.879/20 revealed the historical antecedents of the Marriage Act, 1884; the present Marriage Act, 1914, of Nigeria is a facsimile of the Marriage Ordinance, 1884.

The reasons which prompted the enactment of the law, and the views of the various administrators in London and the Colony, as well as the comments thereon of the local communities, are of vital importance to any discussion of the Nigerian Marriage Act, and of statutory marriage as a whole.

Phase Two

To supplement the written materials, it was decided to undertake fieldwork in Nigeria for a period of six months.

Fieldwork, a well-known method of investigation among social anthropologists, is relatively new to lawyers, who have been mainly content to peruse legal treatises, statutes, and

judicial decisions in cloistered law chambers and libraries. This pattern of legal study has now been changed, and the legal profession generally agrees that laws are not divorced from the society in which they operate.[1] To promote a better understanding of the legal principles involved, the law as administered by the courts, and handed down in judicial decisions, must be viewed against the background of the law as actually practised by the communities concerned. For a valid analysis of certain aspects of law, for example, marriage, or the law of property, time needs to be spent in ascertaining the current operation of the law in society. In many cases, as will be later seen, there are wide divergencies between the law as prescribed in legislation[2], or as enunciated by the courts, and the law as actually practised by the community. This phenomenon is especially apparent in the realm of customary law, which is mainly unwritten, and the determination of which can only be ascertained by the current practice of the majority of the particular society.

The courts enforce what they believe the law is, or should be, which may be very different from the actual law observed by the community.

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1. See Pound, Sociological Jurisprudence:(London: 1907), p. 615: "To this end it is the duty of teachers of law while they teach scrupulously the law that the courts administer, to teach it in the spirit and from the standpoint of the political, economic and sociological learning of today. It is their task to create in this country, a true sociological jurisprudence, to develop a thorough understanding between the people and the law, to ensure that the common law remains what its exponents have always insisted it is - the custom of the people, the expression of their habits of thought and action as to the relations of men with each other."

2. In this repect, see the report of Alain Levasseur, "The Modernization of Law in Africa with particular reference to Family Law in the Ivory Coast" in Ghana and the Ivory Coast, edited by Philip Foster and A.R. Zolberg, (Chicago: The University of Chicago Press, 1971), p. 116; family legislation decreed in 1964 (Law 64.375 etc., 7 October 1964) for the Ivory Coast failed completely in its purpose and became 'fantasy law' because the people ignored its provisions. See also Marlene Dobkin, "Colonialism and the Legal Status of Women in Francophonic Africa",31 Cahiers d'Etudes Africaines, Vol. 8, 1968,pp. 390-405.

In a study of this kind, it is important not only to determine what the law is, or what the actual practices of the people are, but, as far as possible, also to ascertain the society's views as to what the law should be in the future, since law is never static.

It was with these aims in mind that a period of fieldwork was planned, embracing investigation in selected areas in Nigeria. It was important to study the majority of Nigerian women, and for this reason Igbo, Yoruba and Moslem areas were chosen. The Igbos, Yorubas, and the three main Moslem communities - the Hausas, Fulanis and Kanuris - together accounted for 67 per cent of the population in 1953 and 70.5 per cent in 1963.[1] The Igbo town of Onitsha, Ibadan, a Yoruba town, and Maiduguri, a predominantly Kanuri town, were chosen for visits. (see Map 1)

Why were these particular places chosen?
(a) Onitsha was chosen mainly for personal reasons. Onitsha is the hometown of my husband and it was envisaged that I would be given maximum help by his relatives and friends there, since, following the Nigerian custom, I am considered to be the wife of every Onitsha indigene, young or old, male or female. This hope was realized, and, had it not been for this fact, it would have been almost impossible to obtain information from the Onitshas, a rather proud and conservative people, in the relatively short period of time available. Often my visit received cold courtesy, even bordering on courteous antagonism, which quickly evaporated and was replaced by profuse shouts of "anon" ("welcome") when my identity was disclosed.

Additionally, Onitsha is a large market town (reputed to have one of the largest markets in West Africa), and had been one of the first places to be "christianised" among the Igbo communities. The indigenous population live in villages in the older part of the town, which existed before the advent

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1. See Population Census of Nigeria, 1952-1953, Summary Tables, p.7; North, p. 26; East, pp.18-19; West,p.18; and Population Census of Nigeria 1963, Vol. 3, p. 10.

of Europeans. The fieldwork was carried out in two of these villages, Umudei and Ogboli.

(b) The situation of the oldest Nigerian university, and the National archives made Ibadan an obvious choice. Ibadan also has several Customary Courts including a Customary Court of Appeal. In addition, it is the largest town in West Africa, and its women are fairly representative of Yoruba women in the Southern States.

(c) Maiduguri was chosen for several reasons:

(i) it is one of the oldest Islamic communities in Northern Nigeria.

(ii) in spite of this, the Kanuri, who dominate this town, are not as well-documented as other Moslem groups, for example, the Hausas or the Fulanis.

(iii) the town has a Sharia Court of Appeal, and a University.

(iv) my curiosity was aroused by the following description of Kanuri women given by Migeod, who spent twenty-five years in Africa in order to make ethnological studies of the African peoples. He wrote of Kanuri women in 1923:[1]

> "... it is important to note that Kanuri women have always been independent. Leo Africanus went so far as to say the Bornuese had their wife in common. Shehu Lamino tried to coerce them into more seemly behaviour, but had to drop it. There is a Sudan proverb that the wiles of women are ninety-and-nine, and if there be another Satan alone knows it. The maker of the proverb must have had Bornu women in his mind. There is said by the surrounding peoples to be nothing of a carnal nature that the Bornu women do not know and practise. Such past-masters naturally have an independent spirit."

I was intrigued by this description and wanted to know something more of these women who had been subjected to centuries of Islamic law influence, and who could still be described thus. The opportunity to see whether they had changed or not, simply could not be missed.

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1. William H. Migeod, Through Nigeria to Lake Chad,(London: Heath Cranton Ltd., 1924), p.111.

(d) Lastly, but by no means least, I knew a few officials in Maiduguri, a very important consideration when a Christian woman intends to interview Moslem women on such a sensitive topic as marriage.[1]

Although short visits of one week's duration were paid to three other areas, they were not originally planned, but were dictated by events in the field. (see Map 1)

During the fieldwork in Onitsha, non-Onitsha-Igbos alleged that Onitsha is not a typical Igbo town, and that the laws of the people are not representative of Igbo customary laws.[2] It was also claimed that, because of the relatively low dowry paid for an Onitsha wife, the marital relationship is not very stable and that an Onitsha woman usually terminates her marriage at the slightest provocation. I therefore decided to visit two remote Igbo rural[3] villages in Nsukka, where traditional family life has remained relatively intact, in order to draw comparisons. It may be noted here that as far as marriage laws are concerned, the allegations proved untrue, as will be seen later.

I was also advised to visit Eket, an extremely rural Ibibio area. Books were written by the well-known ethnographer

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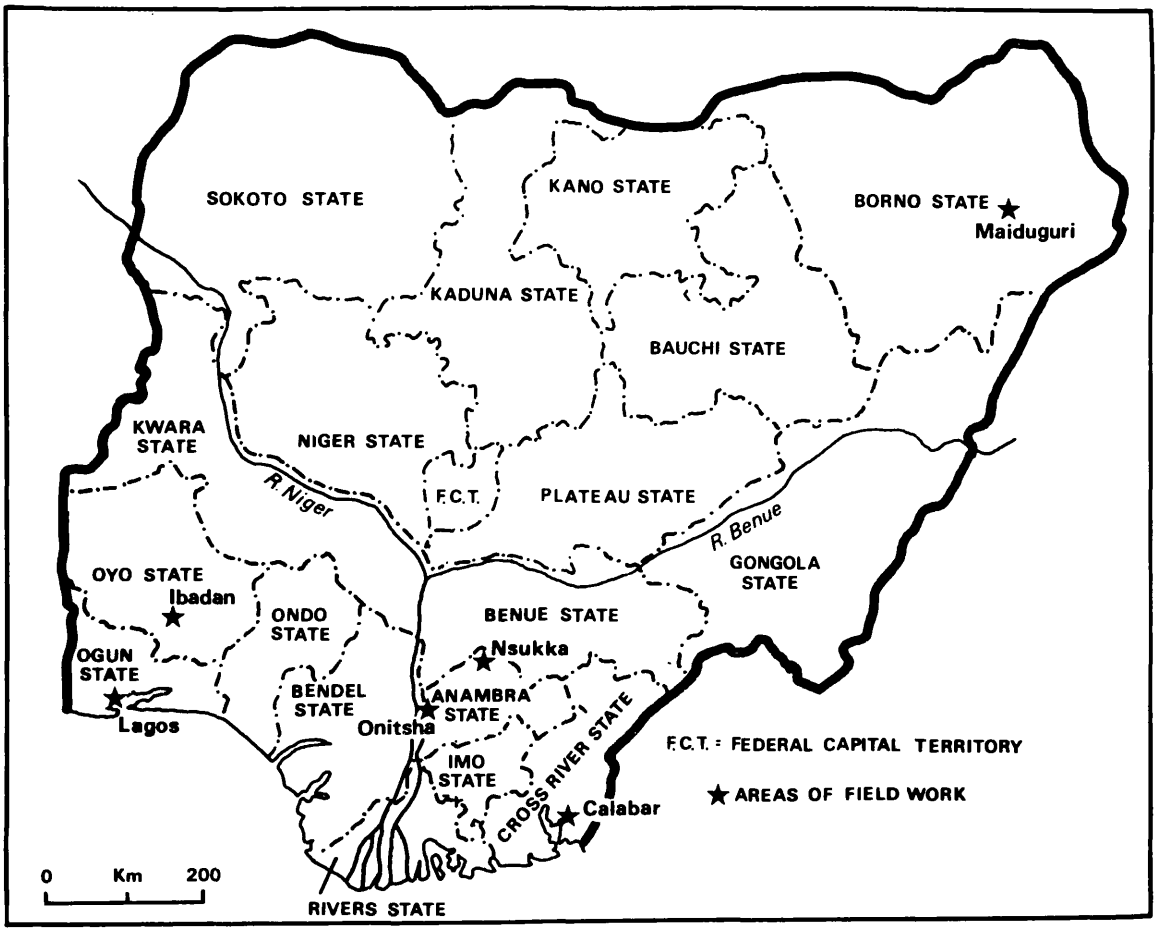
1. Even with official help, I had to wait for one week before I was given a permit, issued from the Governor's office, to conduct interviews with the people. Once this permit was granted, however, considerable assistance and encouragement were given, and grateful thanks are hereby recorded to all the parties concerned.

2. Smock states that in the mid-1930s, many groups, especially those of Onitsha, Arochuku and Oguta rejected the name Ibo as applying to themselves; see Audrey C. Smock, Ibo Politics: The Role of Ethnic Unions in Eastern Nigeria, (Harvard University Press, 1971),p.8; see also Austin J. Shelton, The Igbo-Igala Borderland, (New York: University of New York Press, 1971),p.7.

3. About 90 per cent of the reported population of Nigeria lived in rural areas in 1953, and 85 per cent in 1963. In the 1963 Census an urban area was defined as one with a population of 20,000 or more inhabitants - see The Population Census of Nigeria 1963, Vol. 3, Preface: last paragraph.

MAP 1

STATES 1976: SHOWING AREAS OF FIELD WORK



and colonial administrator Amaury-Talbot and his wife[1] about the women in Eket. It was envisaged that useful comparisons might be made between the marital status of women when they wrote at the beginning of the century and at the present time.

My week's stay in Eket revealed major differences between the laws of Eket and another Ibibio group, the Efik of Calabar. Several Eket informants pointed out these differences. For example, whereas Eket women do not inherit their deceased father's property, if he dies intestate, Efik daughters share equally with sons, and may even become heads of families, an impossible eventuality among the Eket or Igbo people. Another attraction was the fact that Mary Slessor[2], the famous feminist, had devoted her life to the improvement of Calabar women. Calabar was one of the first places to be "christianised" and useful comparisons could be drawn between the women there and Onitsha women.

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1. Several people interviewed in Eket remembered Talbot, but unfortunately, no-one could remember his wife. Informants remembered Talbot with hostility. They said he had slapped a native Chief, who had tried to explain that a boy whom Talbot alleged had taken a shot at him, was only aiming at birds with his slinging shot. The boy had been up a tree and had not seen him passing. The people of Eket instituted a civil action against Talbot in the Calabar Court for this outrage, but dropped the action when he agreed to pay compensation to the Chief. Because of this incident, it was alleged he did not stay long in the Eket area. (Recorded interview with Chief Atai, Ndon Afaha, held on 16 August, 1977, at his home in Eket.)

2. Mary Slessor arrived in Calabar in 1876, and devoted her life to the improvement of women's status in many different parts of the Cross River, including Calabar and Okonyong. Because of her influence in Okonyong, she was appointed Vice-Consul for Okonyong by Sir MacDonald. She was Customary Court Judge in Calabar, and the Court she used, as well as many of the other buildings she erected, are still used today. Her memory is revered by Calabar people, both men and women - for a full length biography see Mary Slessor of Calabar, (W.P. Livingstone, 1918, 4th edition 1935; see also, Carol Christian and Gladys Plummer, God and One Redhead: Mary Slessor of Calabar, (London: Hodder and Stoughton, 1970), and the official tribute paid to her memory in the Nigeria Gazette, 21 January 1915, reproduced in Allan Burns, History of Nigeria, 7th edition, (London: George Allen and Unwin Ltd., 10th imp. 1969), p.268.

Two weeks were spent in Lagos, but this was for the purpose of collection national statistics, and recording unreported decisions of the Lagos High Courts and the Supreme Court situated there.

No systematic pattern was maintained, nor could it be maintained, during fieldwork, since each area presented different opportunities, but the following methods were used in each of the main areas visited and, to a lesser extent, in the other minor areas:

(a) Visits to courts: visits to courts ranked high among the priorities in every area visited, especially visits to Customary Courts.[1] Decisions of Customary Courts are not reported, and opportunity was therefore taken to obtain as many Customary Court decisions as possible.

(b) Interviews: Interviews formed a major part of the field-work in each area, except Lagos. The persons interviewed were chosen mainly on account of their ages, preference being given to older people; and their sex; women being preferred to men.

The aim of these interviews was to verify or contradict, as far as possible, statements made by early writers. Many of the older people interviewed had actually experienced some of the laws recorded as existing before 1900, and were therefore able to give personal experience of the operation of these laws in the society, and the changes which had taken place. For example, a 104-years-old Eket informant recalled the punishment which had been given to men who committed adultery when she was a young girl, and the effect such punishment had on the morality of the people. Laws and traditions handed down to them by their parents were also valuable in estimating the position of women in the traditional society.

Interviews with most of the older people were tape-recorded. They were given an opportunity to relate their marital history, prompted by relevant questions. Wherever necessary local interpreters were employed.

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1. For a brief description and jurisdiction of the various courts in Nigeria see below, Chapter II, pp. 157-161.

(c) Questionnaires: In addition to personal interviews, questionnaires were distributed to literate persons, mainly students from universities, training colleges, and colleges of technology. Research assistants were employed in Onitsha, Ibadan, and Maiduguri to interview illiterate persons, using the questionnaire for this purpose. Most of the older people whose marital history was used for statistical purposes, were interviewed by this method. Their answers were recorded in the questionnaires by the interviewers.

One of the main purposes of the questionnaires was to obtain information as to the role society expects women to play in marriage in future, the type of marriage that is considered most suitable for Nigeria, and how best to ensure marital stability. Many of the questions were therefore designed, not only to show what the position of women was in the traditional society, or to what it is at present, but as a sort of opinion poll intended to mirror the views of the society as to the future. The views of the younger generation in this repect are most important.[1]

(d) Primary and Secondary schools in Enugu, Calabar, and Maiduguri were visited. The children were asked to write essays on the status of women in Nigeria. In most cases their answers were interesting and revealed careful thought. Discussions with teachers in and out of school were also held wherever possible.

(e) Interviews were held with village chiefs, native rulers, and other people knowledgeable about the customary laws of their areas, in order to determine whether the rules of law gleaned from decided court cases accorded with the practice of the people in the various societies. Opportunity was taken at these interviews to pose, for solution, controversial questions of law selected from the literature and decided cases.

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1. See further Chapter XIV, pp. 512-514.

(f) Newspapers, both current and filed, were read, and items of interest extracted. The opinion columns were particularly useful in this respect.

Statistics were collected from the newspapers of changes of names by women[1], and letters of administration granted to wives in relation to the estate of their deceased husbands.

(g) Popular literature, such as novels, plays and short stories written by local authors were read. Onitsha market literature which is dominated by non-professional writers, was especially useful in revealing the popular culture of the people.

(h) Social Welfare Departments.[2] Visits were paid to the Social Welfare Departments of every area visited, except Lagos.

Among the social services rendered by these Departments is "Matrimonial Conciliation and Family Casework", in which the traditional methods of arbitration and reconciliation in family affairs are adopted by specially trained Social Welfare Officers. Although their statutory authority is limited to the welfare of children and young persons under the Children and Young Persons Act, 1946[3] ,these Departments deal with the victims of marital conflict, both old and young, especially where the welfare of children is involved. They

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1. See Chapter VII below, p. 551.

2. In 1941, a report was made to the Nigerian Government on the need for systematic treatment of young offenders, by organised social case work. On the adoption of this report by Government in 1942, a Social Welfare Officer was appointed but the scope of his activities was limited to Lagos Colony. Following the enactment of the Children and Young Persons Act, 1943, the services were extended to the North, East and West and were much improved. In 1953-56, each Regional Government set up its own Department of Social Welfare Services - see Annual Report of the Department of Social Welfare Services, Western Region (including Lagos) 1953-54, pp. 1-2; Annual Report of the Social Welfare Department of the Northern Region of Nigeria, 1955-56; Policy for Local Government - Eastern Region of Nigeria, 1956, Sessional Paper No. 2 of 1956 and the recommendations of the Ashridge Conference on Social Development, August 1951.

3. Cap. 32, Laws of the Federation of Nigeria, 1958; and similar statutes of the same title for other parts of Nigeria.

handle cases of deserted or deserting wives, neglected widows, paternity disputes, and marital disputes generally. Where reconciliation is possible, attempts are made to effect this, often with the aid of the village chief or extended family of the spouse concerned. Where reconciliation is impossible, the Social Welfare Officers concentrate on making the best possible arrangements for the children concerned, in order to prevent delinquency. They may enforce maintenance payments for children by resort to the courts.

The files of cases they have dealt with provide a mine of information on the laws and social practices of the different communities, and reveal to a greater extent than court cases, the position of the ordinary women in marriage and family life. Women who cannot afford the expense of a court action increasingly resort to the Social Welfare Departments for assistance with their marital problems.

2. The Historical Background

A. History of Nigeria

(I) Introductory

The Portuguese were the first European explorers to land in what is now Nigeria. They made their first appearance there in 1472. For the next three hundred years, traders from various nations visited the area, but no settlements were made, the chief purpose of the visits being trade in human cargo.[1]

After the abolition of the slave trade in 1807[2],

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1. See Michael Crowder, The Story of Nigeria, 4th edition, (London: Faber and Faber, 1978), pp.49-58; A.F.C. Ryder, "Dutch Trade on the Niger Coast during the Seventeenth Century", 3, Journal of the Historical Society of Nigeria, 1965, No.2, pp.197-98; Colonial Report, 1953, p.132; K. Onwuka Dike, Trade and Politics in the Niger Delta, 1830-1885, (Oxford: Clarendon Press, 1956), Chapter I.

2. The slave trade was abolished by Denmark in 1802; by Britain in 1807; U.S.A. 1808; Sweden, 1813; Netherlands, 1814; see Crowder, op. cit., p. 100; Burns, History of Nigeria, op.cit. p.77.

British influence progressed steadily, not only on the coastline between Lagos and Calabar, but gradually into the interior as well. By the exertions of Mungo Park, Richard Lander, Dr. Barth, and numerous other explorers, many of whom lost their lives in the attempt, the course of the Niger and the existence of the Fulani kingdom in the interior became known. By 1860, trade was established along the banks of the rivers Niger and Benue.[1]

At this time, of course, Nigeria did not exist.[2] What existed was a multiplicity of tribal groups living in semi-isolation in various parts of the country at different levels of cultural attainment and with different political systems.[3]

British influence was established and consolidated in three main areas, each under a different kind of administration.

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1. See Mungo Park, Travels in the Interior Districts of Africa, (London: 1799); Crowder, op.cit., pp.106-38; Richard Lander, Records of Captain Clapperton's Last Expedition to Africa, (London: 1830, Vol.1; Richard Lander and John Lander, Journals of an Expedition to Explore the Course and Termination of the Niger, (London: 1832); A.F. Mockler-Ferryman, British West Africa, (London: 1900),pp.120-93.

2. The name "Nigeria" was allegedly coined for the agglomeration of pagan and Mohammedan States which were previously under the Royal Niger Company between the Western Sudan and the Bight of Benin, by Flora Shaw, who afterwards became Lady Lugard, in a letter she wrote to the London Times(8 January 1897), see Nigeria Handbook,1926, Chapter 1; James S. Coleman, Nigeria: Background to Nationalism, (Berkeley and Los Angeles: University of California Press, 1965),p.44; Kirk-Greene,"Who coined the Name Nigeria?", West Africa, 22 December 1956; but see S.I. Edokpayi, "The Name Nigerian" West Africa, 16 March 1957, who argues that the word "Nigeria" had in fact been used in 1859-60, by William Cole in his "Journal of an African Timber Trader of Life in the Niger", and that it was Saunders Otley and Company of London who first gave press publication in 1862 to the word "Nigeria".

3. See Burns, History of Nigeria, 1969, pp. 24-64; Colonial Report, 1953,pp. 135-38; Crowder, 1978, op.cit., p.139; Thomas Hodgkin, Nigerian Perspectives: An Historical Anthology, (London: Oxford University Press, 1975), pp1-6; John Hatch, Nigeria: A History, (London: Heinemann Educational Books, 1971) pp.10-16, 17-76.

These were:

(a) the colony of Lagos under the control of the Colonial Office;

(b) the Niger Coast Protectorate under the Foreign Office;

(c) the Royal Niger Company's sphere of administration.[1]

(II) The Colony of Lagos

With the decline of the slave trade after 1807, the traffic in palm oil and other tropical products rapidly increased, and the visits of naval ships, and later of the British Consul at Fernando Po, gave the British considerable prestige and influence among the tribes inhabiting the Nigerian coastline.[2]

In 1851, British support was given to the exiled king of Lagos, who, in return, pledged himself to abolish the slave trade in Lagos, which was at that time, the chief slave market in West Africa.[3] Finding himself powerless against the slave-dealing faction, his son, King Dɔcemo of Lagos, ceded the territory to the British in 1861, and the British Colony of Lagos came into being the following year.[4]

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1. Crowder, 1978, pp. 139-70; Burns, 1969, op. cit.,pp.115 et al.

2. See Dike, Trade and Politics in the Niger Delta, 1956, Chapter III et al; Hope Masterton Waddell, Twenty-Nine Years in the West Indies and Central Africa: A Review of Missionary Work and Adventure 1829-1858, 2nd edition, (1863,London: Frank Cass and Co. Ltd., 1970), Chapter XXI et al; C.W.Newbury, The Western Slave Coast and its Rulers, (London: Oxford University Press, 1961) Chapters II and III; Crowder 1978, pp. 98-138, esp.p.125; Burns, History of Nigeria, 1969, p. 297.

3. Newbury, 1961, pp. 46-48.

4. See Treaties, 17 June and 19 July 1861, Hertslet, XI(1864), pp. 37-39; see also Parliamentary Papers, 1862: Papers relating to the Occupation of Lagos, LXI, p.339; Alan C. Burns, History of Nigeria, 6th edition (London: George Allen and Unwin Ltd., 8th imp., 1963), p.126; T.O.Elias,Nigerian Land Law, 4th edition(1951, London: Routledge and Kegan Paul Ltd., Sweet and Maxwell, 1971), p.2; Attorney General of Southern Nigeria v. John Holt [1910] 2 N.L.R.1; Amodu Tijani v. Secretary, Southern Province,[1921] 3, N.L.R. 21; Oduntan Onisiwo v. Attorney General of Southern Provinces [1912] 2 N.L.R. 77.

On 13 March 1862, a new entity officially called the "Settlement of Lagos" was established. On 19 February 1866, the Settlement of Lagos was merged with Sierra Leone, Gambia, and Gold Coast into what was known as the "West African Settlement", having a separate Legislative Council, but subject to the Governor-in-Chief whose headquarters were at Sierra Leone.[1] This arrangement was changed on 24th July 1874 when a new charter was issued separating the Gold Coast and Lagos from the Government of Sierra Leone, and erecting them into one colony under the name of the Gold Coast Colony, under a Governor-in-Chief at the Gold Coast with an Administrator at Lagos.[2]

On 13 January 1886, Lagos was separated from the Gold Coast and established as an independent colony.

From the time of its cession in 1861, the boundaries of the Colony of Lagos were gradually extended by further cessions until the whole of Yorubaland, with the exception of the Egba State, was attached to the Colony of Lagos as a British Protectorate.[3] In 1914, this area too came unreservedly under the Government of the Protectorate of Nigeria.[4]

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1. See J.J. Crooks, Records Relating to the Gold Coast Settlements, from 1750 to 1874, (Dublin: Browne and Nolan Ltd., 1923),p. 375.

2. Crooks, ibid.,p. 539; See also Newbury, 1961, Chapter IV; Samuel Johnson, The History of the Yorubas: From the Earliest Times to the Beginning of the British Protectorate, edited by O. Johnson, (Lagos: C.S.S. Bookshops, 1921, reprint 1976), pp. 508 et al; Elias, Nigerian Land Law, 1976, pp.2-3.

3. For a useful account of these cessions, and the subsequent reaction of the various communities, see Johnson, History of the Yorubas, esp.pp. 643-50; and for the treaties, see Ibid., Appendix A; see also Newbury, 1961, pp. 77-95; and generally, Burns, History of Nigeria, pp. 127-39, 211-31.

4. See Nigeria: Report by Sir F.D.Lugard on the Amalgamation of Northern and Southern Nigeria and Administration, 1912-1919, Cmd. 468, London, 1920, p. 12; Until 1914 Abeokuta was a semi-independent state, guaranteed by a treaty of 1893, under the administration of the Egba Government - see Crowder, p. 202.

(III) The Niger Coast Protectorate

Twenty-three years after the creation of the Colony of Lagos, the Niger River Delta was established as a British Protectorate. After the opening up of the Niger, trade was established along the banks of the Niger and Benue Rivers. In 1879, the various British firms trading on these rivers were amalgamated. At the Conference of European Powers at Berlin in 1885, Britain successfully claimed that British interests were supreme on the lower Niger. The area known as the Oil Rivers Protectorate came under the control of a British Consul, but administration was left to the National African Company, which consisted of the amalgamated companies. In 1887, a charter was granted to the amalgamated companies, which became known as the Royal Niger Company, Chartered and Limited, to take the lead in opening up the Niger. In 1893, by Order in Council, the Oil Rivers Protectorate was extended over the hinterland and renamed the "Niger Coast Protectorate".[1]

In 1894, after fierce fighting, a British expedition subdued the powerful Jekri Chief, the famous Nana, whose authority had extended over nearly the whole area.[2] In 1897, a similar expedition captured the city of Benin. In 1899, the charter of the Royal Niger Company was revoked, and on 1 January 1900, its territories along the Niger came under the formal control of the British Government.[3] The Arochuku people, however, were not subdued until 1902, and some of the other

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1. See Great Britain: Parliamentary Papers, Niger Coast Protectorate, Report on the administration, 1894-95, 1895 [C. 7916] Vol. LXXI, 245.

2. See Obaro Ikime, Merchant Prince of the Niger Delta, (London: Heinemann, 1968); Hodgkin, Nigerian Perspectives, 373-74; King Jaja of Opobo, another powerful ruler of the Delta had been earlier deported to the West Indies by Britain, see Great Britain: Parliamentary Papers, Papers concerning King Jaja and the Opening of Markets to British Trade, 1888, C. 53657, Vol. LXXIV; Dike, 1956, pp.182-202, 215-17: Hodgkin, 369-73.

3. See Great Britain, Parliamentary Papers, Government of Niger Territories, Papers on the Revocation of the Royal Niger Company's Charter, 1899[C. 9372] Vol.LXIII,p.479; Great Britain, Niger Coast Protectorate: Report on the Administration, 1894-95, 1895 [C.7916] Vol. LXXI,p.245.

Igbo groups, much later than this.[1]

(IV) The Northern Protectorate

As previously noted, the Royal Niger Company, by its charter, became responsible for the government of the river basins and the whole of Hausaland and Bornu, but in practical terms, its influence extended little beyond the banks of the Niger and Benue Rivers. Owing to the restrictions on trade caused by artificial boundaries, and the virtual monopoly which the Niger Company exercised, to the inability of the Company's forces to restrain the slave-raiding propensities of the Fulani Chiefs, and to foreign aggression on the Western frontiers, it became necessary for the British Government to assume a more direct control over the country. When the Company's charter was revoked in 1900, the northern portion of its territories became the Northern Nigerian Protectorate; while the southern portion was added to the Niger Coast Protectorate, and the whole was renamed the Protectorate of Southern Nigeria. Both the Northern and Southern Protectorates were placed under Colonial Office control.[3]

(V) The Unification of Nigeria

When the Royal Niger Company disappeared from the scene as an instrument of government in 1900, there still remained three separate administrations, reduced to two in 1906, when the Colony and Protectorate of Lagos was amalgamated with the Niger Coast Protectorate to form the Colony and

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1. See Crowder, 1978, pp. 188-89; Some parts of Igboland were not finally brought under British control until as late as 1918, see J.C.Anene, "The Southern Nigeria Protectorate and the Aros, 1900-02", 1, J.H.S.N., 1 December 1956, pp. 20-26; Burns, 1969, pp. 215-216.

2. See Crowder, 1978, pp. 171-72; Burns, 1969,pp.162-70; Parliamentary Papers: Papers on the Revocation of the Royal Niger Company's Charter, 1899, op. cit.; see also Parliamentary Papers, Niger Coast Protectorate: Report on the Administration, 1894-95, [C.7916] Vol. LXXI, p.245, generally,

3. Crowder, 1978, p. 172; Burns, 1969,pp. 182-95.

Protectorate of Southern Nigeria.[1]

On 1 January 1914, the Northern Protectorate, and the Colony and Protectorate of Southern Nigeria were amalgamated and formed into the Colony and Protectorate of Nigeria under the authority of Royal Letter Patent and order in Council.[2] Sir Frederick Lugard, who had been appointed Governor of both Northern and Southern Protectorates in 1912, became the first Governor of a united Nigeria.[3]

The country continued in this form until 1954 when a new Constitution[4] came into force. This Constitution created the Federation of Nigeria, consisting of the Federal Territory of Lagos and three Regions, based upon the traditional ethnic groupings of the three main tribes, that is, Hausa/Fulani in the Northern Region, the Yorubas in the West, and the Igbos in the East. In each Region, in addition to the dominant tribe, there were a number of minority groups.[5]

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1. See generally Burns, 1969, pp. 217-22; F.D.Lugard, Nigeria: Report on the Amalgamation of Northern and Southern Nigeria and Administration, 1900-1919, Cmd. 468, London, 1920.

2. See Nigeria: "Report by Sir F.D.Lugard on the Amalgamation of Northern and Southern Nigeria and Administration, 1900-1919", Cmd 468.

3. For a full discussion of the amalgamation generally, see Margery Perham, Lugard: The Years of Authority, 1891-1945, (London: Collins, 1956-60) Vol.II, Chapter XX; See also E.D. Morel, Nigeria, its Peoples and its Problems, 2nd edition, (London: Macmillan, 1912); Crowder,pp. 188-206.

4. See Federal Constitution of Nigeria, 1954.

5. See further Coleman, 1965, op. cit., pp. 369-408; Crowder, op. cit., pp. 224-36; Kalu Ezera, Constitutional Developments in Nigeria, (London: Cambridge University Press, 1964); Frederick A. Schwarz, Nigeria: The Tribes, the Nation, or the Race - The Politics of Independence, (London: M.I.T. Press, 1965. In 1963, a portion of the Western Region was detached to form a fourth Region - the Mid-Western Region.

(VI) The post-Independence era

Nigeria became an independent country on 1 October 1960, followed in 1963 by the creation of the Republic of Nigeria.[1]

In 1963, a new Region, the Mid-Western Region, was carved out of the Western Region.[2]

In 1966, the country suffered two successive military coups, followed in 1967 by a bloody civil war which lasted until 1970.[3]

The immediate cause of the war was the attempt by the Eastern Region to secede from the Nigerian Federation and to establish the independent republic of Biafra. Although the war affected the whole country, the peoples of the former Eastern Region bore the heaviest toll, and at the end of the war in 1970, not only had they lost a significant proportion of their population, but in many cases, all their material possesssions. Men may be the main casualties on the battle-field, but women are the principal sufferers in any war. Not only did women of the Eastern Region lose their fathers, husbands and sons, but, in many cases, they lost their dignity, by wide scale rape, brutality, and other forms of degradation. It is important to bear this point in mind, and the impact of the war and its effect on women and marital life will be ventilated at various points of this thesis. It is pertinent to note, however, that "it's an ill wind that blows nobody good", and in some respects, the war had a beneficial repercussion on the status of women. For example, during the war many women were forced to assume new responsibilities;

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1. See Nigeria Independence Act, 1960 (8 and 9, Eliz. 2.C.55); and Constitution of the Federation Act, 1963, No. 20 of 1963. See also Oluwole I. Odumosu, The Nigerian Constitution: History and Development, (London: Sweet and Maxwell, 1963).

2. See the Mid-Western Region Act 1962, No. 6 of 1962, L.N. 96 of 1963.

3. See N.U. Akpan, The Struggle for Secession, 1966-1970: A Personal Account of the Nigerian Civil War (London: Frank Cass, 1971); John De St. Jore, The Nigerian Civil War, (London: Hodder and Stoughton, 1972); John J. Stremlau, The International Politics of the Nigerian Civil War, 1967-1970, (New Jersey: Princeton University Press, 1977.)

often they were the sole breadwinners of the family when the men were too scared to venture out for fear of being conscripted into the army. After the war, they asserted an independence hitherto unknown to women in some communities, for example, Eket.[1]

In 1967, Nigeria was divided into twelve States instead of the three previous Regions.[2]

In 1976, after another bloody coup in 1975, this division into twelve States was replaced by one of nineteen States with the Federal Territory. The present States are Anambra, Bauchi, Bendel, Benue, Borno, Cross River, Gongola, Imo, Kaduna, Kano, Kwara, Lagos, Niger, Ogun, Ondo, Oyo, Plateau, Rivers and Sokoto.[3]

B. Nigerian Women

(I) Introduction

> "There is no such thing as Nigerian women. There are only Igbo women, Yoruba women, Hausa/Fulani women, and hundreds of others".

This is the emphatic statement of an eighty year old Igbo Chief. He continues, "It is the British who created Nigeria, not God, we are all different."

This was his way of expressing the historical fact that the political entity now known as Nigeria, described as "Africa's Goliath"[4], only came into existence around the

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1. Many male informants in Eket stated that it was difficult to relegate women to their former, docile and servile status, after the Nigerian Civil War, and this caused the break-up of many homes.

2. See States (Creation and Transitional Provisions) Decree, 1967, S.1, Decree No. 14 of 1967.

3. See States (Creation and Transitional Provisions) Decree, 1976, secs. 1 and 6 and the Schedule, Decree No. 12 of 1976, Laws of the Federation of Nigeria; The Constitution of the Federal Republic of Nigeria, 1979, First Schedule Part 1; and Map I, p.65.

4. See John Hatch, Nigeria: A History, (London, Heinemann Educational Books, Ltd., 1971) p.9.

beginning of the present century. Before this, as previously noted, there was only a multiplicity of tribal groups, living at various levels of technological development with little or no contact with each other[1]; ranging in size from a few thousands to many millions; speaking between them two hundred and fifty or more dialects; presenting cultural contrasts in social structure, religion and customs; and having different and more often than not, obscure origins.[2]

How far justified is the old Chief's assertion? This is not an appropriate forum to engage in a political debate as to how and when a group of different tribes can accurately be described as a nation. It may be pertinent to point out, however, that the welding of a diversity of tribes into a "nation" or "state" is not a problem peculiar to Nigeria. A similar process has occurred in most countries of the world. For example, British women include English, Scottish, Welsh and Irish women, each group of which can be broken down into further sub-tribes. The only difference being that the diversity among Nigerian tribes, has not, as in other countries, been mellowed by the passage of time. The United Kingdom of Great Britain and Ireland has existed for nearly three centuries, Nigeria for little more than three decades. It is difficult to find any contemporary nation that did not begin as a geographical expression, in one form or another, from its already existing heterogeneous socio-cultural systems. Nigeria is thus not unique

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1. A variety of links existed between the various states and peoples which were the predecessors of modern Nigeria; between Kanem-Bornu the Hausa States, Nupe, the Jukun kingdom, the Empires of Oyo and Benin, the Delta States and the loosely associated Igbo communities, see Thomas Hodgkin, Nigerian Perspectives: An Historical Anthology, 2nd edition(1960, London: Oxford University Press, 1975), p.2; Cf. Obafemi Awolowo, Path to Nigerian Freedom, (London: Faber and Faber, 1947), p.47. "Nigeria is not a nation. It is a mere geographical expression... The word 'Nigerian' is merely a distinctive appellation to distinguish those who live within Nigeria from those who do not."

2. Hatch, Nigeria: A History, op. cit., pp. 9, 12-16; see J.E. Adetoro, The Handbook of Education in Nigeria, 3rd edition, (Ibadan: African Educational Press, 1966), pp.1-9; Burns, 1969, op. cit., p. 25.

in this respect.[1]

Even though the term "Nigerian women" is acceptable as an accurate general description of the women to whom this work relates, it is still necessary, for the better understanding of the topics dealt with later, to locate the various groups of women in their geographical, tribal and historical perspectives. A sustained and systematic account of the complex and diverse histories of the various peoples and civilizations is not possible here. The subject is brilliantly documented elsewhere.[2] All that is attempted in this section, is to give in concise form, essential basic information about the tribal groups which will be referred to in later chapters. This process necessarily involves choice, and the main determinant has been the relative size of the groups.

According to the 1963 Census, Nigeria has a population of 55,670,000 people, 49.5 per cent of whom are females. It is the most populous country on the African continent[3] and is more than three times the size of the United Kingdom.[4] Although the country is now divided into nineteen states[5] the former dichotomy of Northern and Southern Nigeria is a convenient one, and will be used in much of this work.[6]

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1. See Onigu Otite, "On the Concept of a Nigerian Society" in Ethnic Relations in Nigeria, edited by A.O. Sanda, (Ibadan: Dept. of Sociology, University of Ibadan, Caxton Press, (West Africa) Ltd., 1976),p.4.

2. See Michael Crowder, The Story of Nigeria, 1978; Thomas Hodgkin, Nigerian Perspectives, op. cit., 1974; J.C. Anene, Southern Nigeria in Transition, 1805-1906, 1966; J.S. Coleman, Nigeria, op. cit., 1965; Alan Burns, History of Nigeria, 1969; John Hatch, Nigeria: A History, 1971.

3. Crowder, op.cit., p.11; The total population of Nigeria in 1963 was 55,670,000 - Census of Nigeria, 1963, Vol. 3, See Map No. 3.

4. Annual Abstract of Statistics, 1974, Federal Office of Statistics, Lagos, p.1. The area of Nigeria is 923,769 square miles.

5. See above, Map No. 1, p. 65.

6. See further above, pp. 70-78.

TABLE 1:1

POPULATION OF MAIN ETHNIC GROUPS

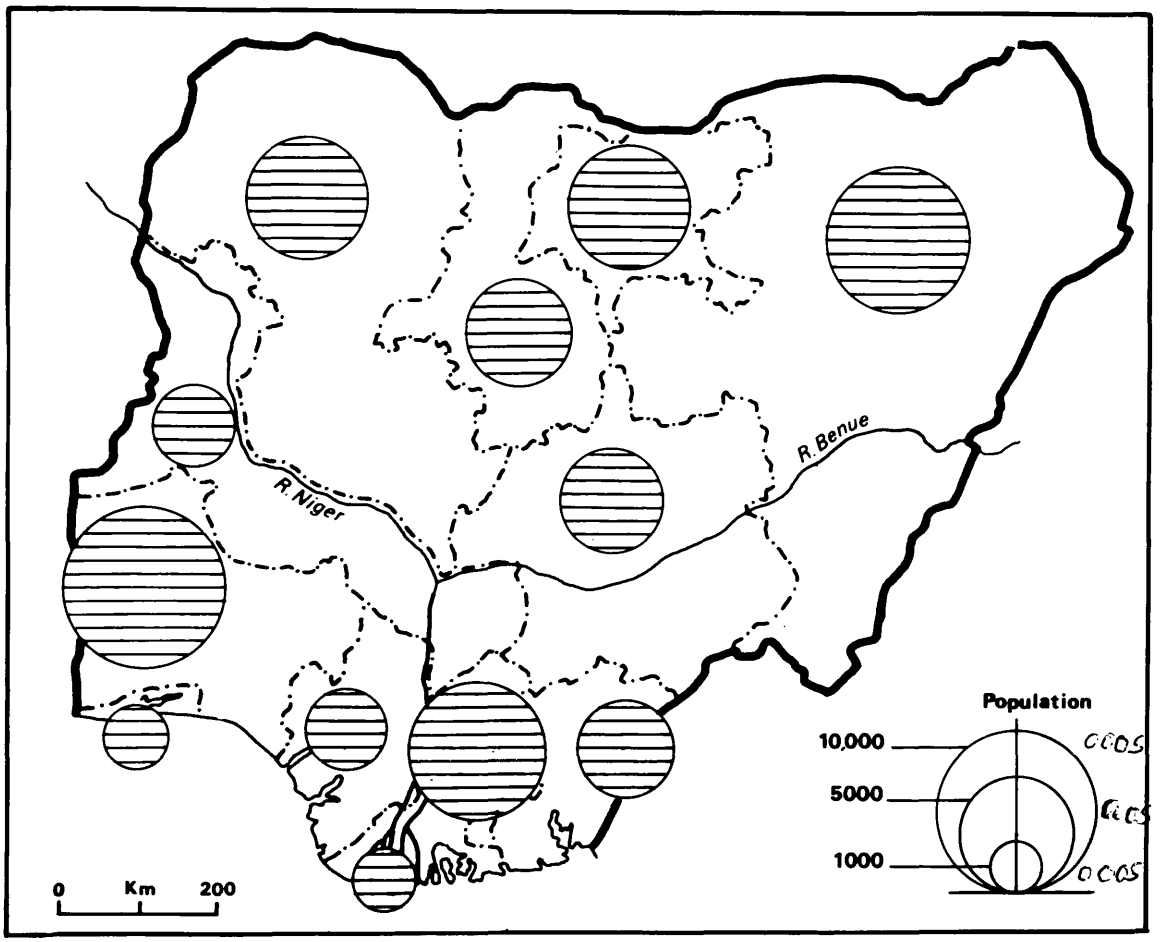
FEDERAL REPUBLIC OF NIGERIA

NATIONALITY AND ETHNIC GROUP	TOTAL	MALES	FEMALES
NIGERIANS	55,558,163	28,041,361	27,516,802
HAUSA	11,652,745	5,936,361	5,716,321
YORUBA	11,320,509	5,767,978	5,552,531
IBO	9,246,388	4,684,849	4,561,539
FULANI	4,784,366	2,448,537	2,335,829
KANURI	2,259,091	1,149,473	1,109,618
IBIBIO	2,006,489	982,010	1,024,479
TIV	1,393,649	711,481	682,168
IJAW	1,088,885	522,661	566,224
EDO	954,970	473,002	481,968
ANNANG	675,004	332,173	342,831
NUPE	656,296	309,382	346,914
URHOBO	639,251	313,845	325,406
IGALA	581,551	284,773	296,778
IDOMA	485,562	232,314	253,248
IGBIRRA	425,783	233,920	191,863
GWARI	378,168	189,747	188,421
EKOI	344,514	165,021	179,493
ISOKO	200,357	99,392	100,965
EFIK	166,297	91,112	75,185

SOURCE: Population Census of Nigeria, 1963, Vol.3, p. 10.

MAP 2

POPULATION OF NIGERIA BY STATE 1963



(II) The main language groups

Southern groups

In the Southern part of the country, the main language groups are the Yorubas, the Igbos, Edos and Ibibios, while in the North the Hausas, Fulanis, Kanuris, Tivs and Nupes predominate.[1]

(a) The Yoruba-speaking peoples[2]

The Yorubas occupy the South-western corner of Nigeria, and are one of the most important and perhaps best known tribes[3] in the country. There are many speculations as to their origin[4], but Ife is generally believed to be their first settlement in Nigeria, and it still remains the spiritual headquarters of

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1. For the classification of the various languages spoken by the main Nigerian groups - see Joseph Greenberg - Studies in African Linguistic Classification, (Compass, New Haven, 1955). For the location of the main ethnic groups, see Map No. 2, p.82.

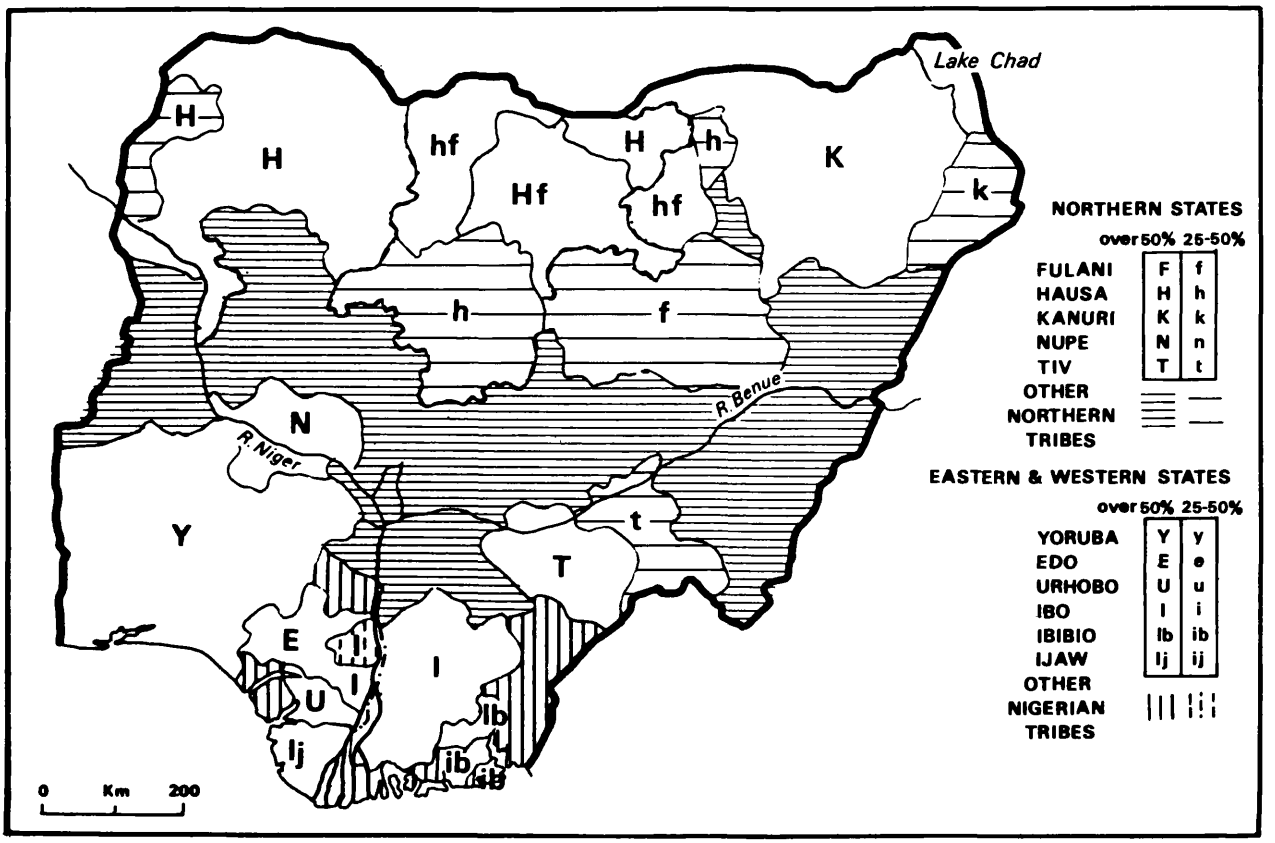
2. For the history of the Yorubas, see Johnson, 1976; Robert Smith, Kingdoms of the Yoruba, (London, Methuen,1969); S.O. Biobaku ed., Sources of Yoruba History, (London: Clarendon Press, 1973); J.F. Ade Ajayi and Robert Smith, Yoruba Warfare in the Nineteenth Century, 2nd edition (1964, Ibadan: Ibadan University Press).

3. The term "tribe" is highly misleading as applied to the peoples of Nigeria, in as much as most of the groups on which it is commonly conferred lack both self-consciousness and political focus as such, and often include a considerable diversity of ancestral stocks. For descriptive purposes, however, it has been customary to list certain major groups, in most of which, the distinguishing characteristic is language. Some of these are localised, and in a few there is physical homogeneity and belief in a single derivation. But neither political, nor ethnic ideas should in general be attached to such categories, since correlation of local histories, traditions and cultures, and language is often fallacious as a guide to racial affinities. The groups are enumerated below are subject to this caveat - see Colonial Report, 1938, No. 1904, para. 32, p. 10.

4. See Johnson, 1978,pp. 1-26; R.C.C.Law, "Traditional History" in Sources of Yoruba History, edited by Biobaku, op. cit., pp. 25-40; J.Olumide Lucas, The Religion of the Yorubas, (Lagos, Nigeria C.M.S. Bookshop, 1948); S.O. Biobaku, The Lugard Lectures, Federal Information Service, 1956, pp. 8-10 and 11-13.

MAP 3

NIGERIA:- MAIN TRIBAL GROUPS



the race[1]. There are several clans, including the Oyos, Egbas, Ifes, Ijebus, Owas, Ijeshas, Ekitis and Ondos. The people of Lagos are also mainly of Yoruba origin, and additionally many Yorubas are found in Ilorin and Kabba areas of Northern Nigeria.[2]

They are said to be the most urban of all African peoples, their urban way of life dating back long before the period of European penetration.[3] Out of the eleven largest towns in Nigeria, nine are entirely Yoruba, while Lagos, which is nearly two-thirds Yoruba, may fairly rank as the tenth.[4] One of these Yoruba towns, Ibadan, is the largest negro city in Africa.[5]

Yoruba women in the nineteenth century were described by Horton thus:

> "The women make excellent traders; within a very short time they would double, treble and even quadruple a very small amount. Their diet and living are generally simple

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1. Burns, History of Nigeria, 1969, pp. 28-30; Wanda Abimbola, "The Literature of the Ifa Cult", in Sources of Yoruba History, edited by Biobaku, op.cit., p.42; Ajayi and Smith, 1971, op. cit., p.1.

2. See Burns, op. cit., p. 38; William Bascom, The Yoruba of South-Western Nigeria, (New York, Holt, Rinehart and Winston, 1969), pp.5-6; A.F. Mockler-Ferryman, Up the Niger: Narrative of Major Claude MacDonald's Mission to the Niger and Benue Rivers, West Africa, (London: George Philip and Son, 1892), pp.171-72.

3. Mabogunje, Urbanization in Nigeria, 1968, op.cit., pp.74-106; Bascom, 1937, op.cit., p.3; Population Census, West, 1952; I.I.Ekanem, The 1963 Nigerian Census: A Critical Appraisal, (Nigeria, Ethiope Publishing Corporation, 1972), pp.59-64; "For all Nigeria (1963) 19.2% of the population lived in urban areas. The corresponding figures for North, East and West were 9.9%, 11.2% and 50.9% respectively.

4. Margery Perham, Native Administration in Nigeria,(London, 1937), p.162; Bascom, 1969, op.cit., p.3. In 1963, 7 out of the 12 largest towns including Lagos were Yoruba towns, see Population Census of Nigeria, 1963, Vol. 3,pp.58-65.

5. Bascom, 1969, op.cit., p.3; Perham, Native Administration, 1937, op.cit., p.178.

> and inexpensive; they are very litigious; some of them are very good looking, nicely shaped and formed, although marked; others are hideously tattooed."[1]

Although a large number of the people now profess the Moslem religion[2], their marriages and family life are governed by customary law[3], and the economic and social independence of the women provide a striking contrast to the Moslem women in the Northern Emirates. For more than a century, the Yoruba were the dominant group among Nigeria's educated elite, and the women are among the best educated Nigerian women.[4] This again is in direct contrast to Moslem women in the North, who are among the most poorly educated in the country.[5]

(b) The Igbo[6] -speaking peoples

The Igbos are a single people in the sense that they speak a number of related dialects, occupy a continuous tract of territory, have many features of social structure and culture in common and believe in a common supreme God known as Chuku

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1. James A. Horton, West African Countries and Peoples, (London, 1868, new edition with introduction by George Shepperson, 1969) p.148.

2. In 1963, 43.4% of the population of the former Western Region professed the Moslem religion as against 48.7% Christians and 7.9% others. See Map No.8, p.194. Cf. in 1913, when it was estimated that Moslems comprised 35% of the population of Ibadan, Ife and Illa towns as a group, see C.G.Elgree, The Evolution of Ibadan, (Ibadan, 1914).

3. See below, Chapter IX, pp. 20-23.

4. For example, in 1947, girls in the Western Region accounted for 9.6% of the total primary school enrolment; in the Eastern Region, 8%, and only 1.75% in the Northern Region, see Colonial Report, 1947, p. 16; For later statistics see further, below, pp.107 et al.

5. See further below, Tables 1:2 - 1:6.

6. Both forms "Igbo" and "Ibo" are in use. "Igbo" is more widespread among the people themselves. "Ibo" seems to have been first adopted largely by foreigners because of the difficulty in pronouncing the "gb". "Igbo" will be used in this thesis except when quoting authors who use the alternative form.

or Chineke, who was reponsible for everything in this world and the next. They were not formerly politically unified, and there are marked dialectical and cultural differences among the various main groups.[1] Talbot[2] divides the Igbos into thirty sub-tribes, but the main groups are the northern group around Awka, northward to Nsukka, and southward to Okigwi; southern or Owerri Igbo, around the town of that name, western Igbo, a western community on the west bank of the Niger and around Onitsha, eastern or Cross River Igbo, near Bende and Arochuku, and north-eastern Igbo, found between Afikpo and Abakaliki. Igbos are mainly located in the south-eastern part of Nigeria on both sides of the river Niger, but sizeable groups are found in different parts of the country especially before the Nigerian civil war.[3]

One of the most powerful group of Igbos is the Aros, guardians of the famous Aro-Chuku oracle which wielded political influence over most of the peoples of the Niger Delta and its hinterland[4] before colonization.

Olandah Equiano, an Igbo who was kidnapped from his home in the mid-eighteenth century, and taken as a slave to Virginia, and later sold in England, describes Igbo women thus:

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1. See Daryll Forde and G.I. Jones, The Ibo and Ibibio-speaking Peoples of South-Eastern Nigeria, (London, International African Institute, 1950),pp. 10-L2; Basden, Among the Ibos of Nigeria, 1966, pp. 27-56; C.K. Meek, Law and Authority in a Nigerian Tribe: A Study in Indirect Rule, (London, Oxford University Press, 1937), pp. 1-19; Burns, History of Nigeria, p. 59; S.N.Nwabara, Iboland: A Century of Contact with Britain, 1860-1960, (London, Hodder and Stoughton,1977), pp. 15-26.

2. See P. Amaury-Talbot, The Peoples of Southern Nigeria, A Sketch of their History, Ethnology and Languages with an Abstract of the 1921 Census, (London: Oxford University Press, 1926), Vol. IV, pp. 39-41; Cf. Meek, Law and Authority, 1937, pp. 1-5.

3. See Forde and Jones, 1950, op. cit., pp. 9-10; G.I. Jones, Ibo Land Tenure 19 Africa, 1949, p. 309; Meek, Law and Authority, op. cit., p. 193.

4. Meek, Law and Authority, pp. 44-45.

> "Our women too were in my eyes at least uncommonly graceful, alert, and modest to a degree of bashfulness; nor do I remember to have ever heard of an instance of incontinence amongst them before marriage. They are also remarkably cheerful. Indeed cheerfulness and affability are two of the leading characteristics of our nation."[1]

The Reverend Bishop Johnson, in 1903, noted that

> "Ibo women are, like their Yoruba land sisters very industrious and hardworking. They are far superior to the men in this, and are said to have far more character in them than men."[2]

Igbo women are also keen traders, and indeed it is said that many of the women seem to do little else but attend markets, and from the small profits made it would appear that markets are attended almost as much for social as for commercial purposes.[3]

One important cultural difference among the Igbos should be noted here. Whereas most Igbo communities have patrilineal or father-oriented social systems, some groups, for example, Afikpo and Ohaffia, have markedly matrilineal, or mother-centred, systems.[4]

(c) The Ibibio-speaking peoples

The Ibibio-speaking peoples are found mainly in South-

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1. Olaudah Equiano, The Interesting Narrative of the Life of Olaudah Equiano, abridged and edited by Paul Edwards, (London: Heinemann, 1967),p.8; see also Horton, 1969, p.156.

2. Bishop Johnson, "Missionary Journeys", Lagos Standard, 29 April 1903.

3. See Sylvia Leith-Ross, African Women: A Study of the Ibo of Nigeria, (London: Routledge and Kegan Paul, 1959, reprint, 1965), pp.86-88; see also Basden, Among the Ibos of Nigeria, op.cit., pp. 89-90; Green, Igbo Village Affairs, p.37.

4. See Philip Nsugbe, Ohaffia: A Matrilineal Ibo People, (London: Oxford University Press, 1974); Simon Ottenberg, Leadership and Authority in an African Society: The Afikpo Village Group, (Seattle, U.S.A.: University of Washington Press, 1971).

Eastern Nigeria, mostly in the Calabar area. They are, after the Igbo, the largest linguistic unit in the Eastern part of Nigeria. Six main sub-divisions or groups are conveniently recognised. These are: Eastern or Ibibio proper; Western or Anang; Northern or Enyong; Southern or Eket, and the Riverain or Efik.[1] Most of the other groups have laws and customs similar to the Igbos, but the Efiks, especially in the laws of inheritance and succession by daughters, bear closer resemblance to the Yorubas. The Efik woman too, has a greater degree of social independence and power[2], in contrast to the Ibibio women of other groups, for example, Eket. According to an Eket chief, the Ibibio woman, before the Nigerian Civil War, "could not be seen, much less heard" in any conclave where men were.

Although education was brought comparatively early to these groups, this fact is not reflected in the general level of education of the women.

Efik is the best known dialect, and is understood by all educated Ibibios.

(d) The Edo-speaking peoples

The Edos, the chief of whom are the Binis[3], are now a comparatively small group of people, but Benin was formerly a very powerful kingdom; and its influence at one time extended

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1. See Forde and Jones, 1950, op.cit., p.67.

2. The high social status of Efik women came out clearly in the essays written by Efik schoolchildren. Many of the boys expressed the desire to be reborn as girls if given the choice, and they listed all the advantages girls have in the society. Igbo schoolchildren, boys and girls, on the other hand, nearly all wanted to be reborn as boys, because of the low social status of Igbo women generally - See further, Chapter XIV.

3. "Bini" is used by Europeans as an adjective and for the dominant people of the Bini kingdom - see R.E.Bradbury and P.C.Lloyd - The Benin Kingdom, 1957 (Reprint, 1970), p.14, Note 4. See also R.E. Bradbury, Benin Studies, edited with an introduction by Peter Morton-Williams, (London: Oxford University Press, Published for the International African Institute, 1973), pp. 44-75.

over a considerable area. [1] For example, it is said that "the original settlers of Lagos were the Binis and the Aworis", and the main dynasty of Benin originated in Yorubaland.[2] The Binis also had considerable impact on the western Igbos, and Onitsha Igbos, and some other groups are said to have originated from Benin.[3]

The group includes the Edo-proper (Beni) of the Benin Kingdom, the Ishan, the Northern Edo and the Urhobo and Isoko of the Niger Delta.[4] As a whole, the group exhibits many common and distinctive cultural features, but, as will be seen later, some groups, such as the Ishan, have unusual customs, for example, recognition of two levels of marriage payments or dowry.[5]

Mention may be made here of the Itsekiri or Jekri who, although they speak a Yoruba dialect, claim descent from an early Oba of Benin. They live in the westernmost part of the Niger Delta, and are sometimes referred to as Warri in the English literature, no doubt after Warri, their main town.[6]

(e) Other southern Groups

There are many other groups of people in Southern Nigeria. Among these, special mention, for future reference, must be made of the Ijaws (Ijo) who live in the Niger Delta.

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1. See Jacob U. Egharevba, A Short History of Benin, 4th edition, (Ibadan, Nigeria: Ibadan University Press, 1968) ; Crowder, 1978, op.cit., pp.37-47; Burns, History of Nigeria, p.40.

2. See Otonba Payne, "Outline of the History of Lagos, and Native Customs", A Paper read at the Lagos Institute on 28 January 1903, Lagos Standard, 11 February 1903; Crowder, op.cit., pp. 45-46.

3. See Crowder, op.cit., p.46; Egharevba, A Short History of Benin, op.cit., p.29; S.I.Bosah, Groundwork of the History and Culture of Onitsha, N.D.pp.3-10.

4. See Bradbury and Lloyd, op.cit., pp.13-17.

5. See below, Chapter III, pp. 254-257.

6. See Bradbury and Lloyd, op.cit., pp. 172 et al; William A. Moore, History of Itsekiri, 2nd edition(1936, London: Frank Cass and Co. Ltd., 1970).

The best known groups are the Bonny, Okrika and Kalabari Ijos.[1] These groups also practice a double level of dowry payments.

Other tribal groups include the Membe[2] and the Yako[3] who occupy the region of the middle Cross River. These two groups are mentioned because they have a double-descent system of inheritance, being both patrilineal and matrilineal.

Northern Groups

The Northern Groups of people comprise mainly:

(a) The Hausa[4]

The Hausa occupy the greater portion of Northern Nigeria, and from an early date had attained a fairly high

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1. See Talbot, Tribes of the Niger Delta: Their Religions and Customs, (1932, London: Frank Cass and Co.Ltd., new imp. 1967),pp. 4-18; E.J. Alagoa, A History of the Niger Delta, (Ibadan, Nigeria: Ibadan University Press, 1972).

2. Rosemary Harris, The Political Organization of the Mbembe, Nigeria, (London: Her Majesty's Stationery Office, London, 1965).

3. Daryll Forde, Marriage and the Family Among the Yako in South-Eastern Nigeria, (Monographs on Social Anthropology, No.5, Published for the London School of Economics and Political Science by Percy Lund, Humphries, and Co. Ltd., 1941).

4. For the history of the Northern Moslem Emirates see generally Crowder, 1978; Burns, 1969,p.46 et al; H.A.S. Johnston, The Fulani Empire of Sokoto, (London, Oxford University Press, 1967),pp.1-17; M.G.Smith, Government in ZauZau, 1800-1950, (London: Oxford University Press, 1960): C.L. Temple, Native Races and Their Rulers: Sketches and Studies of Official Life and Administrative Problems in Nigeria, (Capetown, Argus Printing and Publishing Co.Ltd., 1918); C.K. Meek, Northern Tribes of Nigeria, (London, Oxford University Press, 1925), Vol. 1,pp.85-94; S.G.Hogben and A.H.M. Kirk-Greene, The Emirates of Northern Nigeria, 1966; S.J. Hogben, An Introduction to the History of the Islamic States of Northern Nigeria, (London: Oxford University Press, 1967); C.L. Temple, Notes on the Tribes, Provinces, Emirates and States of Northern Nigeria, 2nd edition(Lagos: C.M.S. Bookshop, 1922).

level of civilization. At the beginning of the 19th century, the Hausa States were conquered by the Fulani, a nomad people who had settled in the towns and country of Hausaland, and who, by their superior intelligence, had acquired great power and influence. Islam reached Hausaland from the West in the mid-fourteenth century, but fifty per cent of the Hausas are said to have been pagans at the time the British occupied the Emirates.[1] Today nearly eighty per cent are Moslems.[2]

Queen Amina of Zaria, (one of the Hausa states), is famous in Hausa history. Under her, Zaria rose to be the most powerful state of the Central Sudan. All the towns, including Nupe, paid tribute to her. The Sarkin Nupe sent forty eunuchs and ten thousand kolas to her. Her conquests extended over thirty four years. Amina is said to have built walled cities, and to have married a fresh husband at each place she stopped, killing him when she left. Daura, another Hausa State, also had a queen.[3]

(b) The Kanuri

The Kanuri are mainly found in Bornu in the North East of Nigeria, a kingdom which has survived for many centuries in spite of great vicissitudes. Islam is said to have penetrated into Bornu as early as the eleventh century. It was known to the Portuguese as early as the fifteenth century, and to Arab geographers, several centuries earlier.

During the eighteenth century, Hausaland and Bornu engaged in a series of wars amongst themselves, and with other

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1. J.S. Trimmingham, A History of Islam in West Africa, (London: Oxford University Press, 1970), p.230.

2. See Population Census: Northern Nigeria, 1963, Vol.2, pp.215-71.

3. See H.A.S.Johnston, The Fulani Empire of Sokoto, 1967, op.cit., p.260; the Federal Government of Nigeria in 1975 issued a set of three stamps to commemorate International Women's Year, proclaimed by the United Nations. The stamps bear a common motif of Queen Amina of Zaria, and other national female heroines. The stamps were on sale for six months, see Sunday Renaissance, 24 August, 1975, p.3.

peoples, oftentimes the defeated town having to seek a new home.[1]

Of the Bornu Empire Schultze observes as follows:

> "It is not generally realized, even in Nigeria, how ancient and powerful the old Bornu Empire was. In the fifteenth century it was the greatest power in Central Africa, and its boundaries extended to Fezzan, the Niger, and practically to the Benue. The Hausas of whom one hears so much nowadays, were then a congerie of obscure semi-pagan tribes, while the Fulani are, of course, politically speaking mere upstarts of a century ago."[2]

Kanuri women, although they are Moslems, had a reputation for independence of spirit and freedom in marital affairs.[3]

(c) The Fulani[4]

The Fulani by origin are light-skinned cattle nomads found in various parts of the Sudan, and the women especially are extremely beautiful. Some settled in Nigeria and lived peacefully with their neighbours. Some even intermarried with the local population, but most of them remained devoted to their traditional religion and to their nomadic way of life. Those who settled in the towns became proselytes of the Moslem

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1. See the authorities cited on p. 91 n.4 above; see also Migeod, Through Nigeria to Lake Chad, 1924, op.cit.; Louis Brenner, The Shehus of Kukawa: A History of the al-Kanem Dynasty of Bornu, (London: Clarendon Press, 1973); Arnold Schultze, The Sultanate of Bornu, edited and translated from the German with additions, etc. by Askell Benton, (London, 1913).

2. Schultze, The Sultanate of Bornu, p.4.

3. See further, Chapter IX below, pp. 62-65.

4. See Johnson, The Fulani Empire of Sokoto, op. cit., esp. p.17-26; E.J. Arnett, The Rise of the Sokoto Fulani, (Kano, 1922); Heinrich Barth, Travels and Discoveries in Northern and Central Africa, 1849-1885, (London: Frank Cass, 1965), 3 Vols.; Edward C. Hopen, The Pastoral Fulbe Family in Gwandu, (London: oxford University Press, 1958); H.R.Palmer, Sudanese Memoirs:being mainly translations of a number of Arabian manuscripts, (London: Frank Cass and Co. Ltd., 1967).

religion, and in Hausaland found a niche for themselves in the courts of the Hausa kings - gaining political and economic wealth. They formed a movement for religious and intellectual reform, ably led in Nigeria by an elderly Moslem scholar, Usman Dan Fodio, a Fulani born in Gobir from a clan which had emigrated to Nigeria from Mali, fourteen centuries before. He became head of a great jihad (holy war) which, within a few years, swept the Hausa kings off their thrones and established Fulani rulers. He pushed forward into Ilorin, the Yoruba town, and contributed to the breakup of the old Oyo Empire. He nearly conquered Yorubaland itself.[1]

The Fulanis are divided into Settled Fulanis, who live in the towns and are mainly Moslems, and Nomadic Fulanis[2] who are cattle people and are generally non-Moslems (Maguzawa).

(d) The Tivs[3]

The Tivs are by far the largest pagan tribe in Northern Nigeria. They mainly occupy the region bordering both banks of the Benue River. Tiv is the name these people use to refer to themselves. By the twentieth century, however, writers were referring to them as Munshi, the name by which they are known to

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1. See Tucker, Abeokuta or Sunrise within the Tropics: An Outline of the Origins and Progress of the Yoruba Mission, (London, James Nisbet and Co., 1853), p.12; Meek, Northern Tribes of Nigeria, pp.98-102; Johnson, History of the Yorubas, pp.193-205,258-88.

2. See D.J. Stenning, Savannah Nomads, (London: Oxford University Press, 1959); J.R. Wilson-Haffenden, The Red Men of Nigeria: An Account of a Lengthy Residence Among the Fulani or "Red Men" and other Pagan Tribes of Central Nigeria, (London: Frank Cass, Ltd., 1930, 1967 reprint); F.W. de St. Croix, The Fulani of Northern Nigeria: Some General Notes, (Lagos, Government Printer, 1944); Greenberg, The Influence of Islam on a Sudanese Religion, (New York: J.J. Augustin, Publisher, 1946).

3. See generally, R.C. Abraham, The Tiv People, 2nd edition, (1934, Lagos: C.M.S.Bookshop,1940); Akiga, Akiga's Story, translated and annotated by Rupert East(London; Oxford University Press, 1965); S.A. Crowther, Journal of an Expedition up the Niger and Tshadda rivers, undertaken by McGregor Laird... in connection with the British Government in 1854, (London: Church Missionary House,1855); J.I.Tseayo, "The Emirate System and Tiv Reaction to Pagan Status in Northern Nigeria", in Nigeria: Economy and Society,

- footnote continued overleaf

the Hausas. The term Munshi was also used officially until the 1920s when it was discarded in favour of their own name for themselves.[1]

Few African tribes can boast of a longer resistance to European influence than these people. Their resistance earned them the reputation of being "truculent and almost brutally primitive"[2], a reputation which has today proved palpably false.[3]

(e) The Nupe

The Nupe is one of the larger groups inhabiting the area of the Niger Benue Confluence.[4] Politically, the people of the Niger Benue confluence exhibit widely different systems, ranging from the highly organized state of the Nupe[5] with a ruling dynasty of Fulani descent, and the Igbirra and Igala chiefdoms with their "divine kings" to the fragmentary state-lets of the Idoma-speaking peoples.

Of these people the Nupe are the only ones to have been Islamized to any considerable extent.[6] The first Nupe king to become a Moslem is thought to have reigned about 1770.

Continuation of footnote 3. from previous page:

edited by Gavin Williams,(London, Rex Collins, 1976),pp.76-89; Migeod, Through British Cameroons, (London, 1925); Mockler-Ferryman, Up the Niger, op. cit., pp. 74 et al.

1. The term Tiv will be used to designate these people as far as possible throughout this thesis.

2. Perham, Native Administration in Nigeria, 1937, op.cit., pp. 152-53.

3. Laura Bohannan and Paul Bohannan, The Tiv of Central Nigeria, (1953, London: International Africa Institute, reprint,1969); see also Tseayo, "The Emirate System and Tiv Reaction", op. cit., p.88.

4. Daryll Forde, ed. Peoples of the Niger-Benue Confluence, (1955, London, Internationa African Institute, 1970).

5. See S.F. Nadel, A Black Byzantium: The Kingdom of Nupe in Nigeria, (London: Oxford University Press, reprint, 1965).

6. Not more than one-third of the Nupe were even nominally Moslem in 1880, today two-thirds at least would claim to be Moslems, and Islamic law is paramount - see Spencer Trimmingham, A History of Islam in West Africa, 1970, p. 230. Cf. other Northern tribes, see Map 8, p.194.

Although many Nupe women are Moslems, they have a reputation of being ardent traders, and like Yoruba women, present a contrast to the Moslem women of the far North, in the degree of freedom of movement they exercise.[1]

3. The Elements of Status

A. Introduction

It is necessary at this point to discuss what is meant by "legal status" within the context of this thesis.

Judicial and academic opinions are united in declaring the difficulty of finding a generally acceptable definition of the term "status". Thus Austin remarks:

> "To determine precisely what a status is, is in my opinion the most difficult problem in the whole science of jurisprudence."[2]

Markby expressed misgivings at having to explain the term "status or condition", "about which much has been written, but[3] as the writers themselves generally confess, without much result"; while Allen was bewildered at the confusion surrounding the topic, and would have been deterred from writing on the subject at all had he noted Austin's discouraging remark before he set out on his own attempt. His diffidence was accentuated by the fact that Continental jurisprudence seems to be

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1. See Nadel, A Black Byzantium, 1965, pp.330-34.

2. J. Austin, Lectures on Jurisprudence or the Philosophy of Positive Law, 5th edition, 1885, (edited by R. Cambell), Vol.II, p. 351.

3. William Markby, Elements of Law Considered with Reference to Principles of General Jurisprudence, 1905, 6th edition, para. 168, p. 97.

similarly reticent on the topic.[1]

The difficulty in defining status is not confined to lawyers: sociologists are equally unsucessful in finding a univerally acceptable definition of status.[2]

In modern social science, status denotes principally the position occupied by a person with repect to the distribution of prestige within a social system, and sometimes by implication, with repect to the distribution of rights, obligations, power and authority within the same system.[3] Thus a person, or a class of persons, may be described as having a high status or a low status in a particular society. In other words, status is used as a synonym for prestige or honour, and the adjective social is frequently used with status when it is intended in this sense. Mair, the well-known social anthropologist notes that:

> "When we speak of status we mean a person's position in his society, as it might be a point on a map, the sum total of his different relationships to other members of his society."[4]

Linton, the American anthropologist, chose "status" to mean the place of an individual in society, and defined it as a collection of rights and duties, with "role" defined as

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1. Carleton K. Allen, "Status and Capacity", Law Quarterly Review, Vol. 46, 1930, p. 277 at 278. Savigny said that in his day the confusion in the subject was "somewhat wild" - see Allen - Ibid., p. 278. See also Pollock and Maitland, The History of English Law, Vol. 1, p. 408; For judicial decisions where the difficulty of defining status was expressed see Anibire and Anor v. Howells and Anor [1973] 3 U.I.L.R. 36, Govu v. Stuart [1903] 24 Natal L.R. 440; Mahludi v. R.[1905]; 26 Natal L.R.298.

2. See conflicting defintions of M.P. Banton - Roles: An Introduction to the Study of Social Relations, 1955,p.21; R. Linton, The Study of Man, 1936, pp. 113-114.

3. See A Dictionary of the Social Science, 1964 (eds.J.Gould and Kolb), p.692.

4. Lucy Mair, Anthropology and Social Change, (New York: University of London Athlone Press, 1969, Paperback edition, 1971), p. 122.

the putting into action of these rights and duties; the dynamic aspect of a status.[1]

Banton, in his book, Roles: An Introduction to the Study of Social Relations, rejects Linton's definition of the word status. He asserts that status means the condition of belonging to a particular class of persons, and defines role as a set of rights and obligations. This Banton's definition of 'role' is similar to Linton's definition of 'status'.[2]

The difficulty of defining status is generally attributed to the fact that the word has no very precise connotations. Although "status" has a popular or dictionary meaning of a person's social position or rank in relation to others, "status" is essentially a legal term and connotes the sum of the legal capacities of an individual, his powers to enforce legal rights and obligations either for himself or others.[3]

Status may be "legal status", "economic status", "political status", "educational status", etc., each denoting a collection of rights and duties which a person has in relation to others.

B. Legal status

Status in its legal sense is a more precise and exact term than in its broad popular meaning. Graveson notes that "status" has rarely been used, and never defined in an English statute, but the word has been used to apply to things so diverse as Egypt, enemy merchant vessels, private industrial pension plans, etc., in short, to almost any single thing to

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1. R. Linton, The Study of Man, (London: Appleton-Century Company, 1937, pp.113-14.

2. Michael P. Banton, Roles: An Introduction to the Study of Social Relations, (London: Tavistock Publications, 1965), p.21.

3. See M. Radin, "Status" in E.R.A.Seligman, ed., Encyclopedia of the Social Sciences, 1934, Vol. 14, p. 373.

which the writer chooses to apply it.[1] He observes that in "one form or another, problems of status are constantly before the courts. But it would indeed be hard to discover any other legal concept of equal importance that had been so neglected for so long."

After the best considerations which he was able to give to the subject, and after an extensive examination of the opinions of others, Austin still found no mark by which a status or condition can be distinguished from any other collection of rights and duties, and he concluded that

> "The sets of rights and duties called condition or status have no common generic character which determine what a status or condition is."[2]

Certain rights and duties are detached for convenience from the body of the legal system, and these sets of rights and duties are styled status or conditions[3]. They reside in an individual as belonging to a class. Whenever a set of rights and duties, capacities and incapacities, relate specially and constantly to one class of persons, every person in that class has a status or condition, composed of those special rights and duties, capacities and incapacities.[3]

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1. See R.H. Graveson, Status in the Common Law,(London: University of London, Athlone Press, 1953), p.2; Graveson contends that whatever the bases of "status" may be, it is a legal idea - a conception of law and not a question of fact and he concludes that whether a person has or has not a given status or whether he is entitled to any particular status is a matter solely of legal principle; "Status is a condition imposed by the State but imposed according to settled principles of law." p. 114. He does not consider "status" in the popular or dictionary sense of the position of some particular object or institution.

2. John Austin, Lectures on Jurisprudence or the Philosophy of Positive Law, 5th edition, ed. by R. Campbell,(London: John Murray, 1885), Vol. II, p.687.

3. Ibid., pp. 688,689.

The status of an individual at a given moment of time may be defined as the totality of all his rights and duties as recognized in the laws and customs of the society to which he belongs.[1] The rights constituting a status, and similarly the duties, are of many different kinds, some relating to the world at large or to the society as a whole, others relating to some definite social group, for example, married persons, of which the individual is a member.[2]

A person may be said to have a status in law when he belongs to a class of persons who, by reason only of their membership of that class have rights or duties, capacities or incapacities, specified by law which do not exist in the case of persons not included in the class and which, in most cases at least, could not be created merely by the agreement of such persons.[3] An alien, as distinct from a Nigerian citizen, for example, or a married person as distinct from an unmarried person, an infant as distinct from adults, a bankrupt as distinct from persons financially solvent, are all persons who have a particular status.[4] A husband, as a husband, owes duties to his wife which he owes to no other person and cannot owe merely as a matter of law to any other person. A husband

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1. Farwell, J.'s statement in Re Selot's Trust [1902] 1 Ch. 488,492, that status is one"indivisible whole" does not recognize the fact that a change in the status of a person in one capacity does not necessarily affect his status in another capacity. e.g. a person's discharge in bankruptcy does not affect his status as a father or husband.

2. A.R.Radcliffe-Brown, Structure and Function in Primitive Society: Essays and Addresses (London, Cohen and West Ltd., 1952) p. 37.

3. Ford v. Ford [1947] 73 C.L.R. 524.

4. Graveson, Status in the Common Law, 1953, pp. 14-32; Austin, Lectures on Jurisprudence, op. cit., p.710; William Markby, Elements of Law Considered with Reference to Principles of General Jurisprudence, 6th ed. (London: Clarendon Press, 1905) para. 99, p. 176; Anson, Principles of the English Law of Contract, 24th edit. (London: Clarendon Press,1975), p. 328; John Salmond, Jurisprudence, 7th edit.,(London: Sweet and Maxwell, Ltd., 1924), p.266.

therefore has a status different from that of unmarried men.[1] Similarly a bankrupt, because he is a bankrupt, cannot deal with his property in the same manner as other persons. These consequences follow as a matter of law from the fact of membership of a particular class of persons.[2]

The status of a married person was defined in Niboyet v. Niboyet[3] thus:

> "The status of an individual used as a legal term means the legal position of the individual in or with regard to the rest of the community. That relation between the parties and that status of each of them with regards to the community which are constituted upon marriage are not imposed or defined by contract or agreement but by law. The limitations or conditions or effects of such relation and status are different in different countries. As that relation and that status are imposed by law, the only law which can impose or define such a relation or status (i.e. relative position) so as to bind an individual is the law to which such an individual is subject."[4]

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1. Brett, J. in Niboyet v. Niboyet [1874] 4 P.D.1, at p.11, expressed the opinion that a married person had a status but not a bachelor or spinster, and the House of Lords in Salveson v. Administrator of Austrian Property [1927] A.C. 641, at p. 662, per Lord Dunedin noted that "'status' though sometimes loosely employed to denote the general attribute of being a true and lawful person within the jurisdiction of a particular community, in most of its application has a more restricted and a more technical meaning." See also Austin, Lectures on Jurisprudence, op. cit., "A freeman or citizen has no status."

2. Cf. Roman law where a person who had a status was the normal citizen of full age and capacity without any disability; the citizen who had full liberty and family rights without any disability; with the common law where "status" is used with reference to a person who had less or more rights than the average person. In English law status implies a legal classification of exceptions to the normal man or woman, see Buckland, A Textbook of Roman Law from Augustus to Justinian, (Cambridge: Cambridge University Press, 1921), p.59.

3. [1874] 4 P.D.1; although the decision was overruled, the obiter dicta with reference to "status" were not adversely criticised.

4. Niboyet v. Niboyet [1878] 4 P.D.1 at pp. 11-12.

Allen makes a distinction between status, the condition which gives rise to certain capacities or incapacities or both; capacity, the power to acquire and exercise rights, and the rights themselves which are acquired by the exercise of capacity.[1]

The different uses of the word status are illustrated by the fact that marriage itself is a status,[2] that is, in the sense that it is a condition[3] of belonging to a particular class of persons which gives rise to certain capacities and incapacities; as used by Allen in the first sense. But there is also the status of a person within the status of marriage, i.e. the capacity and the power to exercise rights or be subjected to duties within the status of marriage, Allen's second use of the term , which he refers to as "capacity".

As used in the context of this thesis, legal status means the totality of rights and obligations, capacities and incapacities, attached to a group of persons, that is - women. The principle concern of the thesis is with the legal status of women in marriage, and not, for example, with their legal status in politics, contract or tort, where these are unrelated to marriage. Neither is the thesis concerned with those aspects of marriage which are not legal. However, women's status in any sphere of life is not dependent on law alone, and marriage is no exception. There are other factors, such as "educational status", which may affect the degree to which a wife is capable of exercising her legal rights in marriage. Again, her political status may determine what laws are made to govern her marital status.

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1. See Carleton K. Allen, Legal Duties and other Essays in Jurisprudence, (London: Clarendon Press, 1931), p.47

2. See King v. Gray [1907] 24 S.C.554 (Supreme Court of the Cape of Good Hope)

3. "Status" is often held to be synonymous with condition - see Mahludi v. R. [1905] 26 Natal Law Reports, 298; Austin states that "a status or condition is a capacity or ability to take rights or to incur or to become subject to duties which the law confers on a person as meaning homo or man" Austin,- Lectures, op. cit., p. 714.

Other types of "status"

Certain types of status which directly affect the legal status of women in marriage will be briefly discussed here. These are:

(i) educational status
(ii) economic status
(iii) political status

The social status of women at different periods of time is highly relevant to the main theme: references to this are incorporated in the text, in the appropriate contexts.

C. Educational status

The introduction into Nigeria of the Western type of education[1] disrupted the parity between male and female education which previously existed in the traditional society.

Every homogeneous society has its own system of rearing children and instilling in them those tools of life necessary for effective existence. African society has always had its own scheme for inculcating its mores and norms in the young in preparation for adult life in the community. The system envisaged the different roles in the society played by males and females respectively, and accordingly, education and training after the weaning period was of a practical nature and bifurcated.

The young boy followed his father to the farm or to hunt in the forest. In a pastoral community, he helped his father to tend the cattle. In this way the child acquired those skills which fitted him to be a farmer, hunter or herdsman. He accompanied his father to the meetings of elders and learnt much of the history and tradition of his people. He became acquainted with the laws and methods of government

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1. "Western education" means the formal and systematic instruction in subjects characteristic of the curricula used in Western societies. This system of instruction was designed to standardize the training of young people, not only in the values of a modern industrialized society, but in the necessary skill for meaningful participation in that modernizing society.(J.S. Coleman, Nigeria: Background to Nationalism, 1965, p.443) Cf. Otonti Nduka, Western Education and the Nigerian Cultural Background,(Ibadan: Oxford University Press, 1964, p.4)

during the discussions which took place at those meetings. As soon as he had the required capacity, he was given admission to the secret societies reserved for male members, a prevalent feature of many Nigerian societies. In the field of sports, he learnt to wrestle and play other games the men played.

The young girl, on the other hand, helped her mother with the household chores, followed her to market, and learnt her particular trade. She was taught to weed and cultivate women's crops, to take care of her younger siblings, do petty farming or petty trade, or whatever other occupation her mother and the female members of her family were engaged in. She was trained to be a good wife and mother,(her main occupation in life), and, as soon as she was old enough, was allowed to attend women's meetings. In other words, she was equipped for her status in life.

There was, therefore, separation, but no discrimination in educational opportunities; no question of the boy being educated while his sister was not. Both received the type of education best suited for their effective participation in the society.[1]

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1. For education in the traditional society, see Saburi Biobaku, "The Effects of Urbanisation on Education in Africa: The Nigerian Experience", International Review of Education, Vol.XIII, 1967, No.4, pp.451-459; J.A.O.Akindele, History of Education in Nigeria, (Oyo: Nigeria, Ojoro Printing Works, 1967), p.8 et al; Abdou Moumouni, Education in Africa, (London: Andre Deutsch Ltd., 1968), pp. 15 et al; J. A. Majasan, Traditional System of Education in Nigeria, Nigeria Magazine, No. 119, 1976, pp.23-29; see also No.'s 120 and 121. Ibid. Cf. the views of Mary Kingsley "Missionary and other forms of white education have not been given to African women to anything like the same extent that they have been given to men... our white culture has not had a grasp over the womankind of Africa that can compare with that it has had over the men," see Mary Kingsley, West African Studies, (London: Macmillan and Co. Ltd., 1899), p.376; Babs A. Fafunwa, History of Education in Nigeria, (London: George Allen)

The introduction of the western type of education, with its concomitants reading, writing[1], and the formality of a school, changed this traditional pattern. The result was disastrous to the status of women generally, and indirectly affected their legal status in marriage. Western education led to a significant dislocation of society and ultimate neglect of the mainstay of the Nigerian economy - agriculture, in which women played a full part. In some parts of the country, for example, among the Ibibios, women did most of the heavy work associated with farming, including clearing of the bush. Women thus had a dominant economic role.[2]

Possession of a formal education became the new yardstick of social status and economic wealth. Western education created a new class of social elites[3], who in turn created a society which was European in outlook. Increased urbanization, and the establishment of various institutions, created a need for Nigerians with formal education. Few of these new jobs were available to women because they lacked the required formal education.[4]

Boys had a headstart in the field of Education in Nigeria, as in other parts of the world. While the boys were sent to school grudgingly at first[5], it must be admitted,

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1. Before the establishment of the Protectorate of Northern Nigeria, Moslem schools were already functioning on a fairly wide scale. Most of these schools were "Koranic" schools where religious instruction as well as reading and writing in Arabic were taught. Many of the older women interviewed in Maidugari went to such schools; See also Albert Ogunsola, Legislation and Education in Northern Nigeria, (London: Oxford University Press, 1974), p.6; Otoni Nduka,"Colonial Education and Nigerian Society", in Nigeria, Economy and Society, edit. by Gavin Williams, (London: Rex Collins, 1976), pp.94-95.

2. For the economic status of women see below, p.125.

3. See Hugh Smythe and Mabel Smythe, The New Nigerian Elite, (Stanford: U.S.A., Stanford University Press, 1971), p.165.

4. See Hugh Smythe and Mabel Smythe, The New Nigerian Elite, 1971, p.11.

5. See A.E. Afigbo, "The Background to the Southern Nigeria Education Code, 1903," 4, Journal of the Historical Society

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parents retained their hostility to Western education for a longer time in the case of girls. It was extremely difficult for a girl to be sent to school.[1]

Burns[2], writing on African education, pointed out that there is a striking similarity in the objections which have been raised by parents in areas as widely separated as Northern Nigeria, Uganda, and the West Cameroons - objections which derive almost entirely from the dangers to which it is believed education will lead, rather than from any traditions which these areas might share. He says:

> "It is claimed that schooling makes girls discontented and immoral, that girls who have been to school are less willing to undertake heavy labour in the fields, that there are no women teachers in the schools and that there is a real moral danger to adolescent girls in mixed schools with male teachers; and where the custom of bride wealth is strong parents commonly prefer marriage rather than schooling for their daughters"[3]

Footnote continued from previous page:
of Nigeria, 1968, No. 2, p. 206; after fifty years of missionary education on the coastal towns in Nigeria, farming, fishing and trading continued to compete with Western education as training for boys and girls; see also W.Waddell, 1863, op.cit., p.267. Cf. the position in 1948 when 2,105 candidates competed for the 30 places available at the Government College Umuahia in the former Eastern Provinces, see Colonial Reports, 1948,p.60.

1. Attempts to popularize the education of girls in the first two decades of this century met almost everywhere with a complete lack of encouragement; at the outbreak of the first World War, there were only seven or eight schools solely for girls, and very few girls were attending mixed schools - See G.H. Campbell, Some Educational Problems in Southern Nigeria in Connection with Progress Towards Self-Government, Ms. held in the library of the Institute of Education,London University. p.2.

2. See Donald G. Burns, African Education: An Introductory Survey of Education in Commonwealth Countries (London: Oxford University Press, 1965); See also Memorandum on Educational Policy in Nigeria, 1947, Chapter XI, The Education of Women and Girls, pp.30-35.

3. See, "Some Trends in Education in the Western Region of Nigeria 1955-1965," 1965, I.L.O. Labour Office Mission Pilot Project for Rural Employment Promotion, 1955-1960, p.5; see also "Report of the Committee on the Review of the Primary Education System in the Western State of Nigeria", 1968; Western Nigeria Development Plan, 1962-68, Sessional Paper No. 8 of 1962,p.40.

A major factor contributing to the reluctance to educate girls in Nigeria, was the recognition that any benefits from a girl's education would accrue to her future husband instead of her natal family. "Child-marriage" was also a potent factor militating against the education of girls. The attitude of parents towards paying for the education of girls is reflected in the fact that when the former Western Region introduced free primary education in January 1955, the proportion of boys to girls changed from 3:1 in 1954 to 2:1 in 1955. The number of girls at school more than doubled between these two years. This showed that parents did not object to the education of girls, but that they were not prepared to pay for it when there were boys to be educated.

Giving priority to the education of boys is a general trend all over West Africa and other parts of the world.[1] In West Africa, the inferior educational status of women is illustrated by the fact that the ratio of girls to the total number of pupils in primary schools in 1945, in Nigeria was 1:5; in the Gold Coast 1:4; Sierra Leone 1:4 and Gambia 1:5.[2]

This differential was maintained in the secondary school. The secondary education of girls everywhere in West Africa, except in Freetown and Bathurst, lagged behind that of boys. The ratios of girls to the total number of pupils in secondary schools in the various territories were - Southern Nigeria 1:8, Northern Nigeria 1:16, Ghana (then the Gold Coast)

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1. In 1961 UNESCO launched a large scale investigation into primary school attendance. Out of the 85 countries covered, 51 counted over 46 per cent of girls among school attenders. However, in 24 countries girls represented only ten to forty per cent of primary school pupils. In 1965, of 122 member countries or associate members of UNESCO, only 58, - less than one half - had as many girls as boys in primary schools. In secondary schools the differentials are less in favour of girls - see Evelyne Sullerot, Woman, Society and Change, translated from the French by Margaret Scotland Archer, (London: World University Library, 1971), pp. 113-116.

2. Great Britain: Report of the Commission on Higher Education in West Africa, 1945, Cmd.6655, para.13, p.22.

1:8; Sierra Leone 2:5; Gambia (Bathurst only) 2:3.[1]

The disparity between male and female education continued at the university level. The percentages which women formed of the total student population in 1959 in various universities were 35 in Rhodesia, 33 in the West Indies, 26 in Hong Kong, 25 in Malaya, 10 in Sierra Leone, 8 in Malta, 7 in East Africa and Ghana, 6 at Ibadan in Nigeria, 4 at Khartoum, and 24 for Great Britain.[2] It is therefore evident from these figures that the inferior status of women in higher education was pandemic.

With particular reference to Nigeria, the tables, graphs and maps below illustrate the gap which exists between the education of boys and that of girls generally.[3] In 1959, a year before Nigeria gained her political independence, and when many of the women interviewed during field-work for this thesis were of primary school age, girls represented only 36.7 of the total primary school population, although in 1963, women were 49.5 percent of the population of Nigeria. The percentage of girls in primary schools rose slowly from 36.7 per cent in 1959, to 39 percent in 1966, just before the political disturbances disrupted education in the eastern parts of the country. But after the Civil War ended in 1970, although the number of girls actually enrolled in all types of schools shows a steady increase, the percentage of girls in the total primary school population has actually decreased. From 36.7 percent in 1959, it has fallen to 28.5 percent in 1973. (Table 1:2, Fig. I). When it is considered that the numbers of males and females are almost equal, it is evident that a greater proportion of men are being educated now than was the case in 1959. Additionally, there are more school drop-outs among girls than there are among boys, so that the position may be much worse than the figures show .[4]

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1. Ibid. - para 34, p.27.

2. See A.M. Carr-Saunders, New Universities Overseas, 1961, p. 187. In Great Britain there was one university student for every 500 of the population; in Nigeria 1:20,000; Ghana 1:9,000; West Indies and Malaya 1:4,000.

3. See Tables 1:3 and 1:5 below.

4. See 'Report of the Committee on the Review of the Primary Education System in the Western State of Nigeria,'(Government Printer Ibadan, 1968); Out of every primary school generation since 1959, there were not less than 52% drop-outs before Primary VI.

TABLE 1:2

PRIMARY EDUCATION: STUDENTS ENROLLED IN PRIMARY SCHOOLS - (ACTUAL NUMBERS)[a]

	SOUTHERN STATES		NORTHERN STATES		NIGERIA		
YEAR	B	G	B	G	B	G	TOTAL
1959[b]	1,571,858	953,168	184,522	66,390	1,756,380	1,019,558	2,775,938
1965	1,442,000	976,913	349,563	143,266	1,791,563	1,120,179	2,911,742
1966	1,477,591	1,029,526	367,776	151,088	1,845,367	1,180,614	3,025,981
1967[c]	742,249	529,909	363,624	143,194	1,105,873	673,103	1,778,976
1968[d]	534,717	387,081	394,200	151,037	928,917	538,118	1,467,035
1969[c]	772,710	549,566	431,535	169,497	1,204,245	719,063	1,923,308
1970	2,846,190	1,106,852	669,637	192,746	3,515,827	1,299,598	4,815,425
1971	3,126,554	1,270,872	767,985	224,623	3,894,539	1,495,495	5,390,034
1972	3,536,731	1,464,094	854,466	252,237	4,391,197	1,716,331	6,107,528
1973	3,726,425	1,574,504	934,696	278,691	4,661,121	1,853,195	6,514,316

a Sources: Compiled from statistics in the Annual Abstract of Statistics, Federal Office of Statistics, Lagos, 1966, 1969, and 1974.

b Compiled from Digest of Statistics, Federal Ministry of Information, 1959.

c Numbers do not include enrolment in the Eastern States

d Numbers do not include enrolment in the Eastern and Mid-Western States.

TABLE 1:3

PRIMARY EDUCATION: STUDENTS ENROLLED IN PRIMARY SCOOLS BY PERCENTAGES OF TOTAL SCHOOL ENROLMENT BY SEX AND STATE.

	SOUTHERN STATES			NORTHERN STATES			TOTAL % BY SEX	
	B	G	TOTAL	B	G	TOTAL	B	G
1959[b]	56.6	34.3	90.9	6.7	2.4	9.1	63.3	36.7
1965	49.5	33.5	83.0	12.0	5.0	17.0	61.5	38.5
1966	48.8	34.0	82.8	12.2	5.0	17.2	61.0	39.0
1967[c]	41.73	29.77	71.5	20.44	8.06	28.5	62.17	37.83
1968[d]	36.45	26.39	62.84	26.87	10.29	37.16	63.32	36.68
1969[c]	40.18	28.57	68.75	22.44	8.81	31.25	62.62	37.38
1970	59.1	23.0	82.1	13.9	4.0	17.9	73.0	27.0
1971	58.0	23.6	81.6	14.2	4.2	18.4	72.2	27.8
1972	57.9	24.0	81.9	14.0	4.1	18.1	71.9	28.1
1973	57.2	24.2	81.4	14.3	4.3	18.6	71.5	28.5

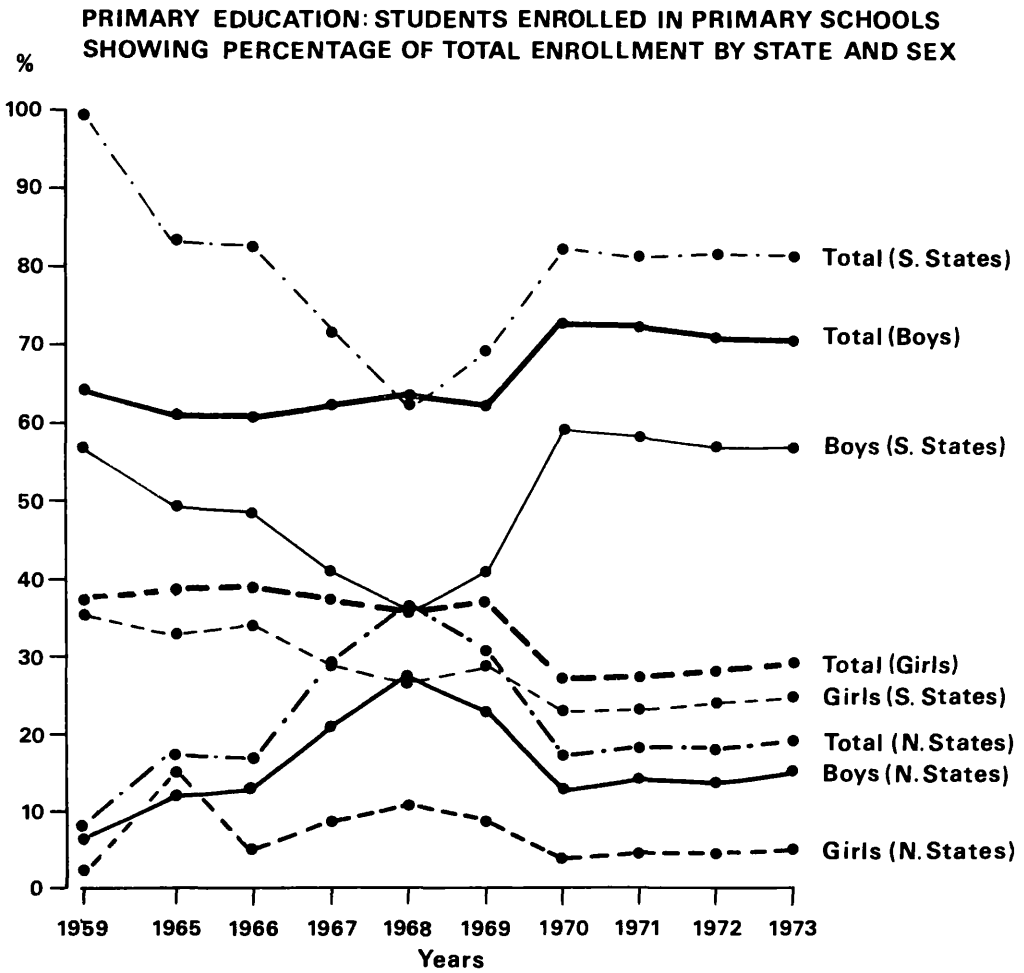
a Sources: Compiled from statistics in the Annual Abstract of Statistics, Federal Office of Statistics, Lagos, 1966, 1969 and 1974.

b Source: Compiled from Digest of Statistics, Federal Ministry of Information, 1959.

c Numbers do not include enrolment in the Eastern States.

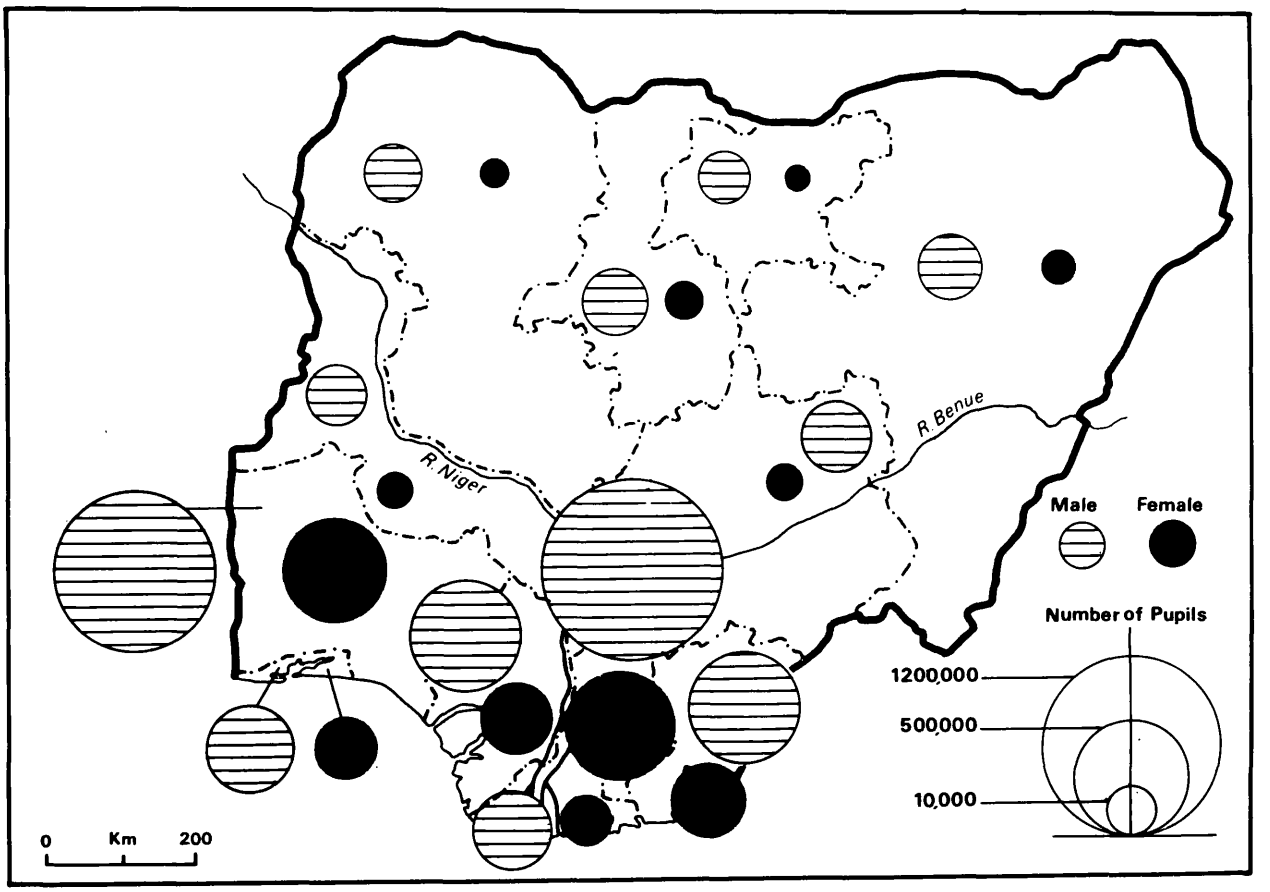
d Numbers do not include enrolment in the Eastern and Mid-Western States.

FIGURE I


PRIMARY EDUCATION: STUDENTS ENROLLED IN PRIMARY SCHOOLS
SHOWING PERCENTAGE OF TOTAL ENROLLMENT BY STATE AND SEX
%
100
90
80
70
60
50
40
30
20
10
0
1959
1965
1966
1967
1968
1969
1970
1971
1972
1973
Years
Total (S. States)
Total (Boys)
Boys (S. States)
Total (Girls)
Girls (S. States)
Total (N. States)
Boys (N. States)
Girls (N. States)

MAP 4

PRIMARY EDUCATION: NUMBER OF PUPILS ENROLLED BY SEX AND STATE 1972



The educational imbalance in favour of boys continues to exist at the secondary school level. In 1959, girls accounted for only 20.5 per cent of the total secondary school population. This percentage has risen steadily over the period 1959 to 1972, although enrolment showed a sharp decrease from 33.6 per cent in 1970 to only 25.2 per cent in 1972. (Tables 1:4 and 1:5, and Fig.)

TABLE 1:4

SECONDARY EDUCATION (GENERAL): STUDENTS ENROLLED IN SECONDARY SCHOOLS (ACTUAL NUMBERS)[a]

	SOUTHERN STATES		NORTHERN STATES		NIGERIA		
YEAR	B	G	B	G	B	G	TOTAL
1959[b]	84,700	22,485	4,237	446	88,937	15,479	64,209
1965	133,197	60,182	12,618	2,658	145,815	62,840	205,655
1966	131,418	62,187	14,492	3,208	145,910	65,395	211,305
1967[c]	79,832	42,689	16,663	3,653	96,495	46,342	135,162
1968[d]	(129,330)		20,762	5,065	-	-	155,157
1969[c]	54,643	40,874	21,879	6,035	76,522	46,909	123,431
1970	175,945	95,824	30,014	8,271	205,959	104,095	310,054
1971	187,363	104,438	40,568	10,944	227,931	115,382	343,313
1972	337,288	121,269	63,515	13,899	400,813	135,168	535,971

a Sources: Compiled from statistics in the Annual Abstract of Statistics, Federal Office of Statistics, Lagos, 1966, 1969 and 1974.

b Source: Compiled from Digest of Statistics, Federal Ministry of Information, 1959.

c Numbers do not include enrolment in the Eastern States.

d Numbers do not include enrolment in the Eastern or Mid-Western States. The number for the Southern States is for boys and girls.

TABLE 1:5

SECONDARY EDUCATION (GENERAL) STUDENTS ENROLLED IN SECONDARY SCHOOLS AS PERCENTAGES OF TOTAL SCHOOL ENROLMENT BY SEX AND STATE

							TOTAL	
	B	G	TOTAL	B	G	TOTAL	B	G
1959[b]	75.7	20.1	79.5	3.8	0.4	4.2	79.5	20.5
1965	63.8	28.8	92.6	6.1	1.3	7.4	69.9	30.1
1966	62.2	29.4	91.6	6.9	1.5	8.4	69.1	30.9
1967[c]	55.9	29.9	85.8	11.7	2.5	14.2	67.6	32.4
1968[d]	-	-	83.3	13.4	3.3	16.7	-	-
1969[c]	44.3	33.2	77.5	17.7	4.8	22.5	62.0	38.0
1970	56.7	30.9	87.6	9.7	2.7	12.4	66.4	33.6
1971	54.6	30.4	75.0	11.8	3.2	15.0	66.4	33.6
1972	62.9	22.6	85.5	11.9	2.6	14.5	74.8	25.2

a Sources: Compiled from statistics in the Annual Abstract of Statistics, Federal Office of Statistics, Lagos, 1966, 1969 and 1974.

b Source: Complied from Digest of Statistics, Federal Ministry of Information, 1959.

c Numbers do not include enrolment in the Eastern States.

d Numbers do not include enrolment in the Eastern and Mid-Western States.

MAP 5

GENERAL EDUCATION: NUMBER OF PUPILS ENROLLED BY SEX AND STATE 1972 (SECONDARY SCHOOLS)

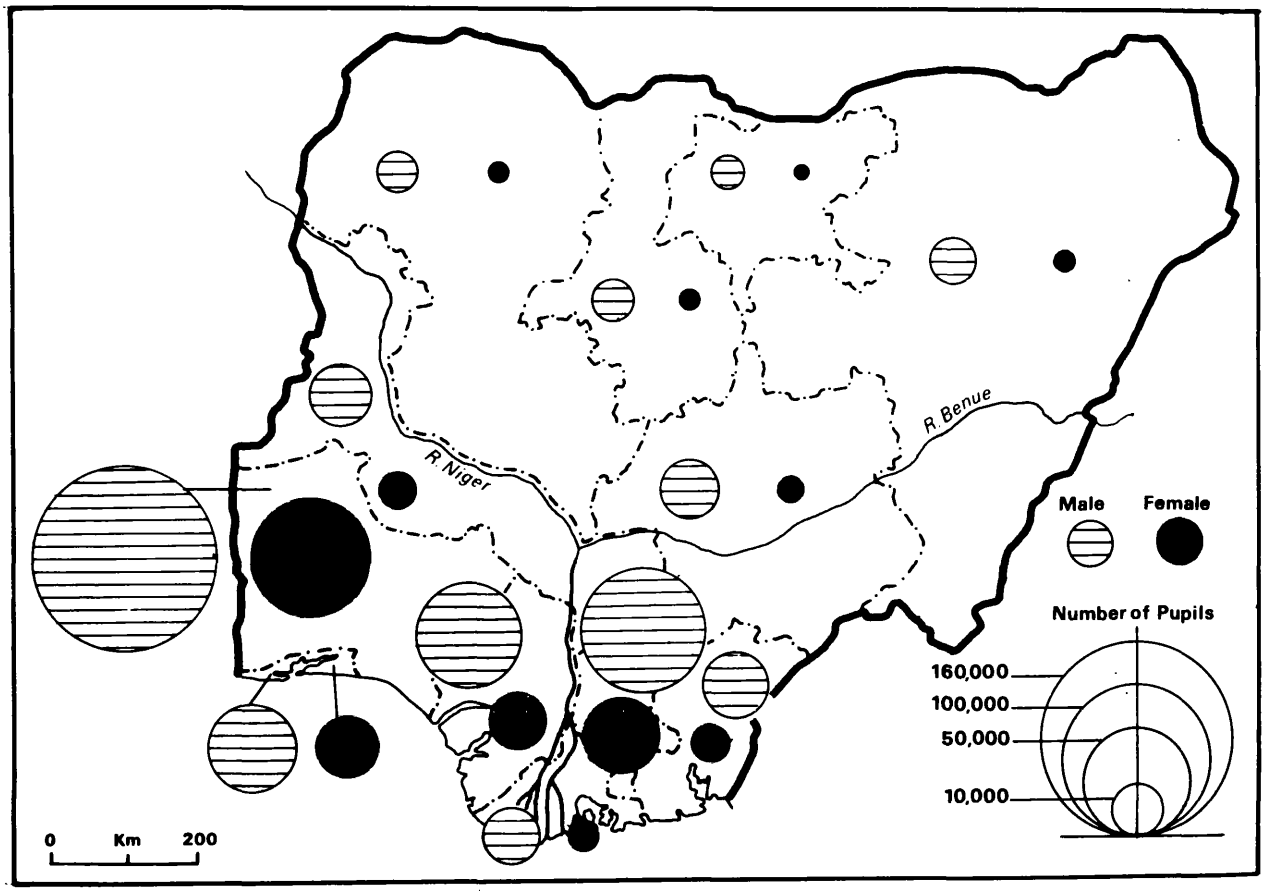
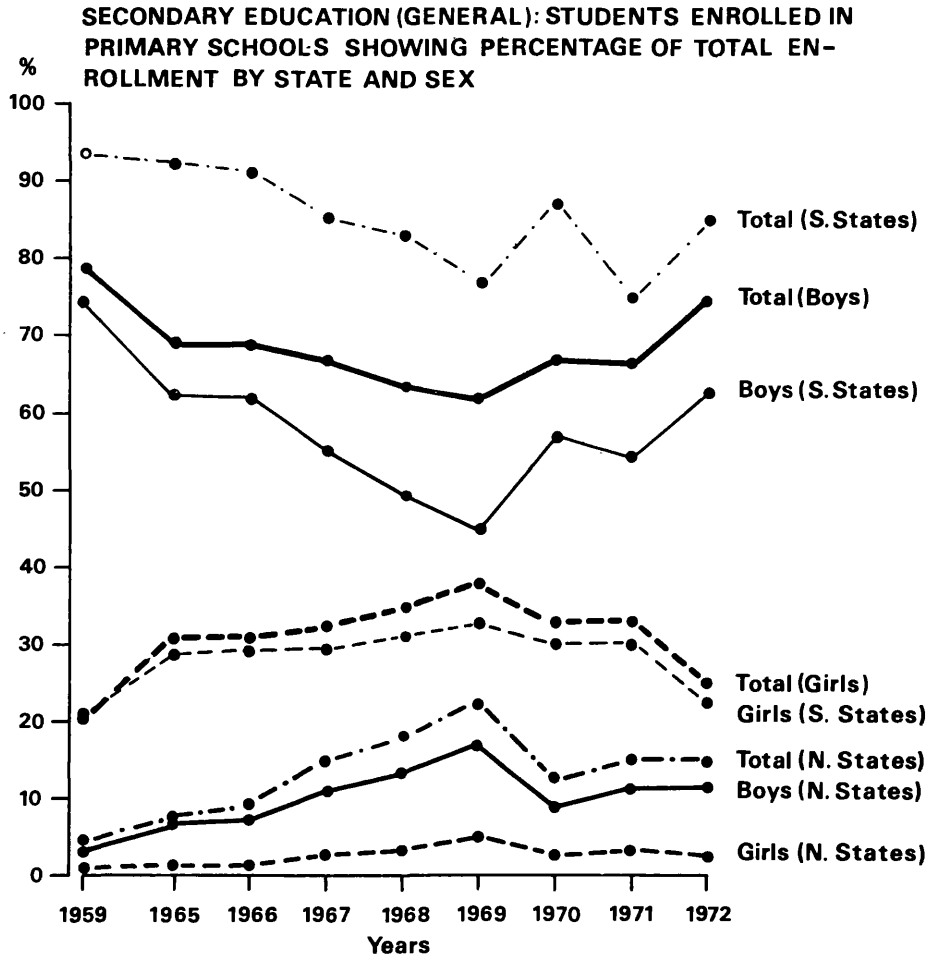


FIGURE 2


SECONDARY EDUCATION (GENERAL): STUDENTS ENROLLED IN PRIMARY SCHOOLS SHOWING PERCENTAGE OF TOTAL ENROLLMENT BY STATE AND SEX
%
100
90
80
70
60
50
40
30
20
10
0
1959
1965
1966
1967
1968
1969
1970
1971
1972
Years
Total (S.States)
Total (Boys)
Boys (S.States)
Total (Girls)
Girls (S. States)
Total (N. States)
Boys (N. States)
Girls (N. States)

The percentage of female teachers employed in all types of educational institutions in Nigeria is extremely low in comparison with the percentage of male teachers. For example, in 1972 there were 130,434 male teachers employed in primary schools in the entire Federation, compared with only 34,312 (20.8 per cent) female teachers.

n the secondary sector, the numbers were 16,722 and 3,239 (16.2 per cent) for male and female respectively, and in Teachers' Training Colleges, while there were 1,915 male teachers employed, there were only 374 (16.4 per cent) female teachers employed. (Table 1:6 and maps No. 7 and 8)

TABLE 1:6

NUMBER OF TEACHERS EXMPLOYED BY TYPE OF SCHOOL AND SEX

	PRIMARY SCHOOLS			SECONDARY SCHOOLS			TEACHERS' TRAINING COLLEGE		
	M	F	% Female	M	F	% Female	M	F	% Female
1970	103,152	24,409	19.2	14,091	2,667	15.9	1,856	366	16.5
1971	116,640	-	-	15,278	2,829	15.6	2,108	344	14.0
1972	130,434	34,312	20.8	16,722	3,239	16.2	1,915	374	16.4
1973	123,780	34,663	21.9	-	-	-	1,863	356	16.0

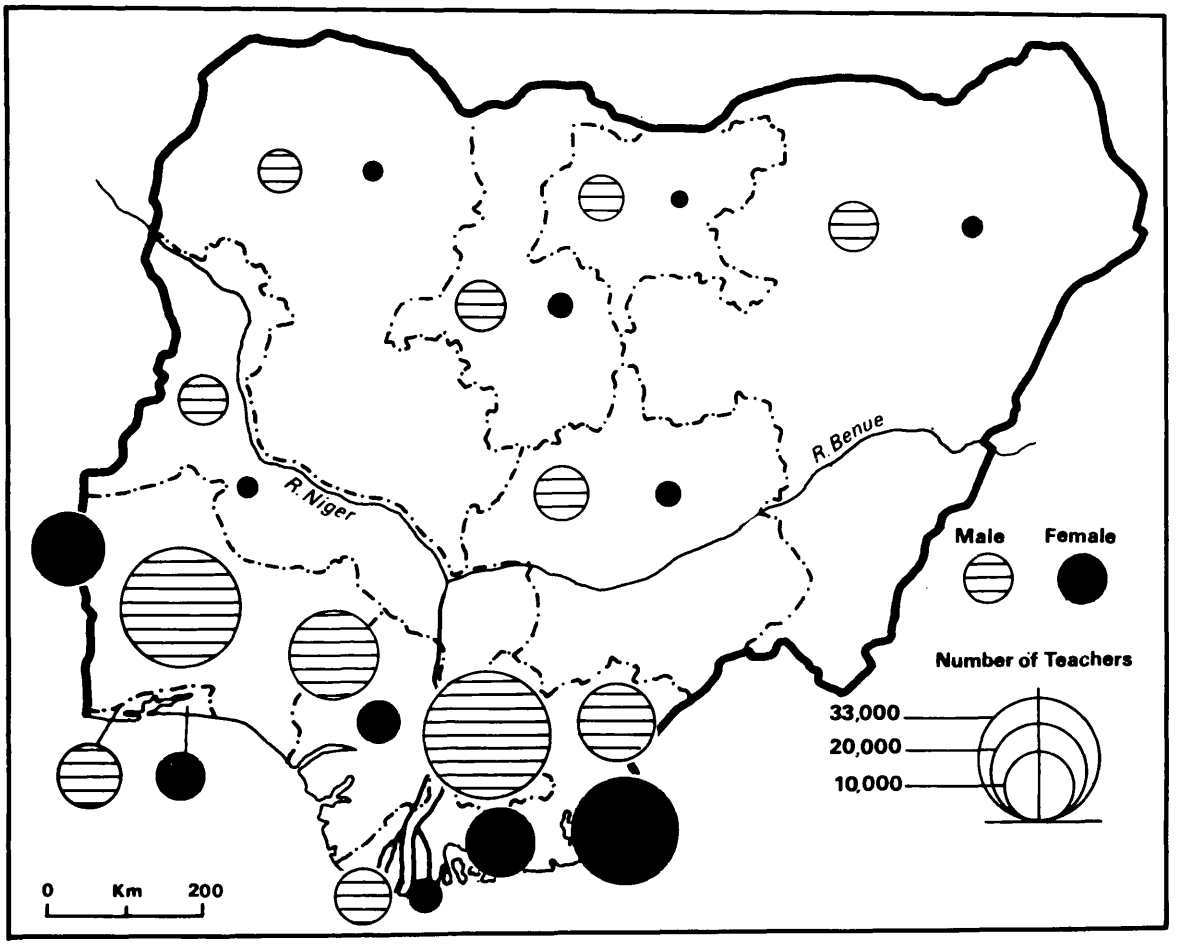
Source: Compiled from statistics, Annual Abstract of Statistics, Federal Office of Statistics, Lagos.

An interesting feature of the educational imbalance is that the total percentage of girls from the Southern States enrolled in both primary and secondary schools is greater than the total percentage of boys enrolled in the Northern States. (Figures 1 and 2.) In 1973, for example, while girls from the Southern States accounted for 24.2 per cent of the total primary school population, boys from the Northern States were only 14.3 per cent of the total primary school population.

The girls from the Northern States are least represented in all types of schools. In 1959, they accounted for only 2.4 per cent of the total primary school population. (Table 1:3), and 1.4 per cent of the total secondary school population of 64,209 pupils enrolled.(Table 1:5)

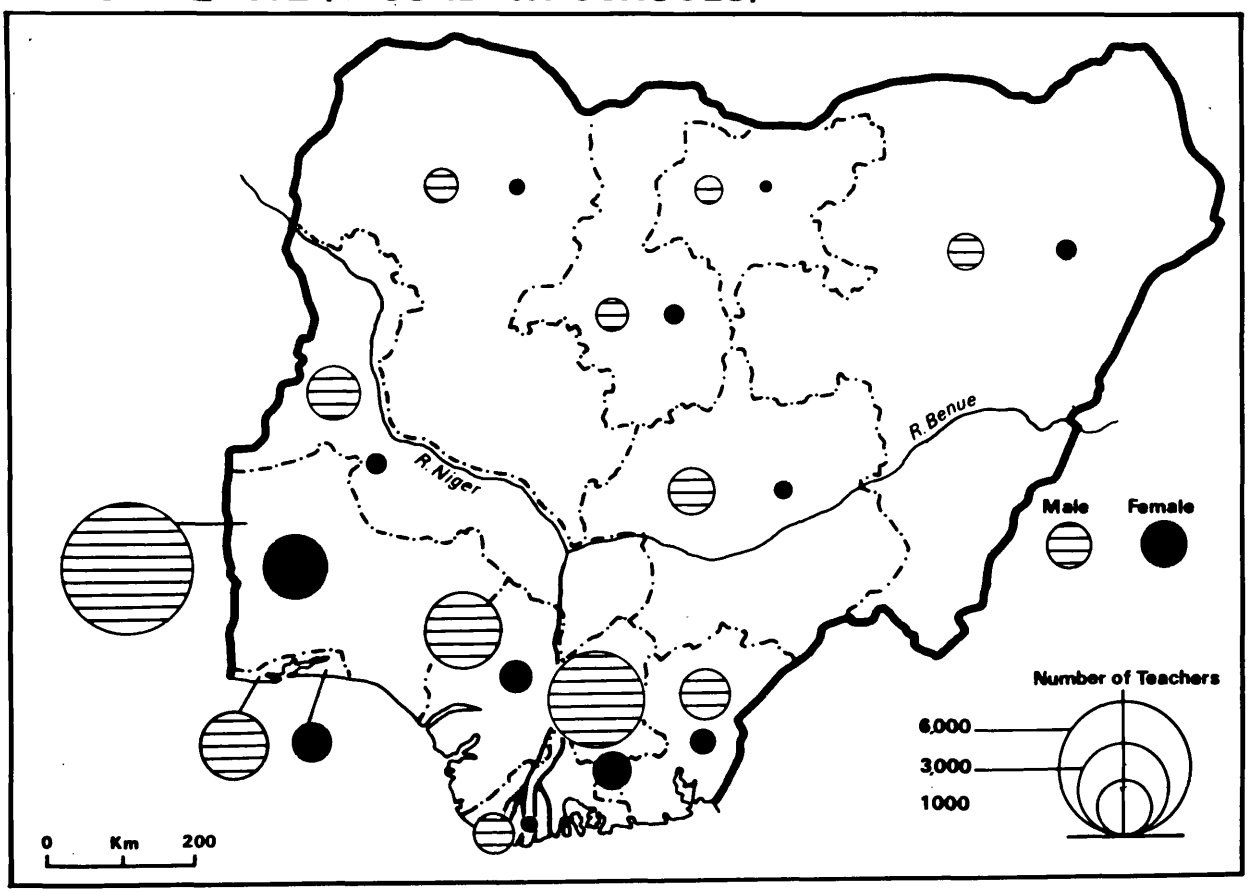
MAP 6

PRIMARY EDUCATION: NUMBER OF TEACHERS EMPLOYED BY SEX AND STATE 1972



MAP 7

GENERAL EDUCATION: NUMBER OF TEACHERS EMPLOYED BY SEX AND STATE 1972 (SECONDARY SCHOOLS)



The responsibility for educating daughters and wives among the Moslems is supposed to be imposed on fathers and husbands respectively.[1] There has traditionally always been a wide gap between the education of male and female Moslems, although references in the Koran and Hadith which encourage the search for knowledge do not discriminate against women.[2]

For a long time after colonization, the education of Moslem children in the North was left in the hands of the local Moslem organizations such as the Ansarudeen Society.[3]

Lugard, in his report of 1900-1901, stressed the importance of no compulsory religious training in the Northern Emirates. He was very concerned about forcing religious education on the children, and in accordance with his promise of non-interference in the religion of the people in the North he thwarted the attempts of Christian missionaries to open

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1. Dan Fodio, who inspired the main Fulani jihad in Nigeria wrote in the early 19th century: " to instruct one's wives, daughters and captives is a positive duty, while to impart knowledge to students is only a work of supererogation, and there is no doubt but that the one takes precedence over the other" - see Uthman Dan Fodio, "Islam and Women", quoted by Hodgkin, in Nigerian Perspectives, op. cit. pp. 254-255. See also Muhammad Yahaya, op. cit. p. 2.

2. See S. A. Galadanci, "Education of Women in Islam with Reference to Nigeria," Nigerian Journal of Islam, Vol.1, No. 2, June 1971, pp. 5-10 at pp. 6-9.

3. See Babs A. Fafunwa, "Islamic Concept of Education with Particular Reference to Modern Nigeria", Nigerian Journal of Islam, Vol.1, No.1, Juné, 1970, p.18; Albert Ogunsola, Legislation and Education in Northern Nigeria, (Ibadan, Nigeria: Oxford University Press, 1974) pp. 5-6; Lugard: Report on Amalgamation, cmd. 468, p.60; S.A.Jimoh,,"A Critical Appraisal of Islamic Education", Nigerian Journal of Islam, Vol. 2, No.1, 1972, pp. 36-37.

Mission schools there.[1] In 1902, he stated the position thus:

> "I am myself of the opinion that it is unwise and unjust to force missions upon the Mohammedan population, for it must be remembered that without the moral support of the Government, these Missions would not be tolerated. In effect, therefore, the Mission obtains its footing on the support of British bayonets, and if they are established by order of Government the people have some cause to disbelieve the emphatic pledges I have given that their religion shall in no way be interfered with."[2]

Left to themselves, Moslem parents preferred not to send their children to school. Fafunwa asserts that the reason why Moslems did not send their children to school to be educated was that they knew that "if their children went to Christian schools they would return home as Christians." Consequently, he argues that Moslem education in Nigeria was retarded, not because the Moslems were unprogressive or that their religion is opposed to formal education, but because "'education' in those days meant Bible knowledge, Christian ethics, Christian moral instruction, Christian literature, some arithmetic, language and crafts, all geared in the direction of producing Christians who could read the Bible."[3]

However true this assertion may have been in the early days of Mission education, the argument loses its validity when applied to the modern situation. Most of the primary and secondary schools in the Northern States are now controlled and financed by the Governments and local authorities.[4] As the figures show, the level of education

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1. See Colonial Office Reports, 1905-1906, of Northern Nigeria, p. 470, especially Report for 1902, p. 136; see also Sonia Graham, Government and Mission Education in Northern Nigeria, 1900-1919, with special reference to the work of Hanns Vischer. (Ibadan; Nigeria, Ibadan University Press, 1966, pp. 6-15; Albert F. Ogunsola, Legislation and Education in Northern Nigeria, 1974, pp. 6-13. Contrast, D.H. Williams, A Short Survey of Education in Northern Nigeria (Ministry of Education, Northern Region, 1959), p. 6.
2. Colonial Report, 1902, p. 136.
3. Fafunwa, "Islamic Concept of Education", op. cit., p. 18.
4. In 1968, all the primary schools within the six Northern States were then administered by Local Education Authorities,

Footnote continued overleaf

in the North still lags far behind that in the South, although there is a slight improvement in the actual number of children being educated.[1]

The reasons for the neglect of girls' education in the Northern States are many,[2] but, as will be later seen, the chief causes are social customs and religious practices such as "child-marriage"[3] and polygamy, under which young girls and, very often, even small children, are married to older men as additional wives, and the practice of seclusion, whereby women cannot associate with men who are not closely related to them.[4]

Footnote continued from previous page:

see Ogunsola, op. cit., p. 58. The Oldman Report recommended the formation of Local Education Authorities, each with an education committee, to provide and administer education in the Northern Region, see H. Oldman, The Administration of Primary Education, 1961, pp. 28-30; Oldman's recommendations resulted in the Education Law, 1962, No. 43 of 1962, Laws of Northern Nigeria.

1. For example, in 1912, the total number of children in school in the Northern Provinces was only 954 compared to 35,716 children in the Southern Provinces in the same year, i.e. 2.7 per cent of total school population were Northerners. By 1926, the numbers increased to 5,210 in the North, compared with 138,248 in the South, 3.8 per cent. The increase in the North is 446 per cent compared to only 387 per cent increase in the South, see Ogunsola, op. cit., p. 56.
2. See Memorandum on Educational Policy on Nigeria, 1947, Sessional Paper, No. 20 of 1947, Chapter XI.
3. See in this respect the submission of Mallama Hassu Kaita in the paper she submitted to the National Curriculum Conference: "A girl may sit for the common entrance examination and get admitted to a secondary school after doing very well in examinations. Her parents may decide to withdraw her from going for further study; in this case she is forced by local customs to get married at the age of twelve to thirteen, sometimes to an old man.", see Federal Ministry of Education, "Report of National Curriculum Conference", Lagos, Nigeria: Nigeria Educational Research Council, 1970; see also Ogunsola, 1974, p. 84; Mallam Aliyu Zaria, "Education of Women and Girls in the Northern Provinces", Ms. kept in the library of the Institute of Education, London University, N.D.
4. See further, below, Chapter IX, pp. 59-67.

At the inception of education in the 1840's in Southern Nigeria, girls could be numbered in twos or threes, while boys came to school by the score, but there had always been equal opportunity for the training of both sexes.[1] Until the early twentieth century, education in Nigeria was left in the hands of the Missionaries who realised the importance of female education, and catered for it, but it was an uphill task to change conservative native opinion as to the value of educating girls.

The pendulum has swung full circle and most parents in the Southern States do not discriminate between boys and girls with reference to education, especially since free primary education in all States of the Federation was instituted in 1976.[2] In fact, many parents stated that they would prefer to educate their daughters, rather than sons, because of the greater financial contributions women now make to their natal families. In the words of a blind 80 year old Igbo Chief from Onitsha,

> "Girls look after their parents better than men. The boy will look after himself and wife and won't bother about anybody else. The girls will look after their parents and the other children of the family."

In spite of this change in attitude towards womens' education, it still lags far behind mens' education.[3] Males predominate in all educational institutions, and consequently, they have

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1. See Waddell, Twenty-Nine Years,...op.cit. pp. 346-347.

2. For e.g. In 1964, the population of girls in elementary schools in the former East Central State was 457,338 which represented about 39 percent of the total primary school population. In 1975 - 1976, school year, the percentage of girls in Anambra State alone, enrolled in primary schools, was 42.5 percent of the total primary school enrollment (actual numbers were 336,392 boys, compared with 271,750 girls). See Annual Report, Ministry of Education, Official Document, No. 4 of 1967, Government Printer Fnugh; and Government of Arambra State, Schools Statistics, 1975#76 School Year, Research and Statistics branch, State School Management Board Fnugh, p.35.

3. See the Tables and maps showing educational imbalance above pp.109 to 117; The Educational Report for 1947 states: In no area does the number of girls attending school in any way compare with the enrollment of boys, and a proportion of 1:3 is the best which has yet been achieved anywhere. A proportion of 1:6 (is) common", see Colonial Reports, 1947, p.48; see also The Ten Year Educational Plan, Dispatch No. 485, dated 19 Nov. 1942, to P.C. Cranborne, Secretary of State, which contains an

Footnote continued overleaf

a near virtual monopoly of professional and skilled jobs.[1]

Formal education prepares the individual for employment in the economically and socially rewarded formal sector of the society. To the extent that women have less chance to enter the higher levels of the educational system, their chances to enter formal employment, and especially the higher level positions within this sector, are proportionately lessened. Of 156 members of "the elites" interviewed by Smythe and Smythe around 1959, only 5 were women.[2] The poor educational attainment of women generally also affects their marital status. The cultural barriers erected between husband and wife due to the fact that the husband may have received a Western education and as a result finds it difficult to form a satisfactory marital relationship with a wife whose way of life, mental outlook and social values are rooted in the traditional culture, have contributed to marital instability in many homes in Nigeria.

Additionally, lack of education deters a wife from understanding and enforcing her marital rights, and in some cases prevents her from appreciating the ill-effects on the welfare of the family which result from the neglect of her marital rights and duties.

Footnote continued from previous page:

extract of the report of Miss Plummer (Lady Education Officer) on "The Education of Women and Girls", Appendix X, para. 34 of the dispatch.

1. See further, below, Table 1:8, p.132.
The introduction of Free Primary education in 1976 will help considerably in correcting the educational imbalance between the sexes, see Federal Republic of Nigeria, National Policy on Education, Federal Ministry of Information, Lagos, 1977, Section 3, Primary Education; 15 (1), p.7, "Government has made primary education free and by implementing the U.P.E. scheme in September 1976, and proposes to make it compulsory as soon as possible."

2. See Hugh Smythe and Mabel Smythe, The New Nigerian Elite, 1971, op.cit. p.11; Bernanrd Nkemdiran, Social Change and Political Violence (London, Arthur Stockwell Ltd. 1975), pp. 27 - 28; E. A. Ayandele, The Educated Elite in the Nigerian Society, (Ibadan, Ibadan University Press, 1974), esp. pp. 13 - 14; see also Employment Aspirations and Prospects of Nigerian University Undergraduates and Graduates, Research Bulletin No. 1#002, Human Resources Research Unit, School of Social Studies, University of Lagos, 1977, pp.26.

D. Economic status

Women traditionally had a high economic status in most Nigerian societies.

For the purpose of this brief examination of the economic status of women, three types of societies will be considered, and the economic role women play in each type of society:

(i) communities where women are secluded and generally do only domestic work which can be done within the confines of the compound;

(ii) agricultural communities;

(iii) communities where women are mainly engaged in trade.

(i) Women in seclusion

This category, which comprises those societies in Northern Nigeria where women were traditionally, and to an increasing extent still are secluded, and prevented from engaging in any activity which involves social intercourse with any man who is not within the prohibited degrees of marriage with them, can be dispensed with easily. Here, womens' economic status was a dependent one generally, and for obvious reasons has remained so.[1] Modernization has only resulted, as will be seen later, in an increase in the number of women secluded, a consequence of enhanced economic prosperity of men generally;[2] the provision of modern amenities such as pipe-borne water, electricity and gas for domestic purposes, making it easier for husbands to dispense with the wives' domestic services which can only be performed outside the compound, for example, fetching water or firewood, for cooking and other domestic purposes.

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1. See further Chapter IX below.

2. See Dorothy Remy, "Underdevelopment and the Experience of Women: A Nigerian Case Study", in Nigeria: Economy and Society, edit. by Gavin Williams, (London: Rex Collings, 1976), pp. 127 - 130); compare Emmy B. Simmons, Economic Research on Women in Rural Development in Northern Nigeria, O.L.C. Paper, No. 10, Sept. 1976, pp. 6 et al, women in purdah earn money in occupations such as food processing, crafts, etc., which do not require contact with people outside their compounds.

(ii) Agricultural communities

In the traditional farming communities, the family's income was derived mainly from three sources.

(a) agriculture - the production of food crops for subsistence or for sale;

(b) tree crops - such as kola-nuts, palm trees, rubber cocoa crops;

(c) home industries - for example, weaving of cloth, basket making, making of pottery, jewelry and household utensils for domestic use or sale.

Although the production of food was undertaken by the family as a unit, the major portion of the work was done by women in the large majority of traditional societies. For example, Igbo communities are predominantly agricultural communities. The type of farming is mainly subsistence farming and the services of the wives and children are indispensable.[1] The husband usually tills the ground and prepares the yam mounds on the land allocated to him.[2] His wife and children are expected to help him in the planting of his crops, usually only yams,[3] and to attend to the weeding of the family farm. In addition to this, the wife invariably interplants such crops as pumpkins, melons, cocoayams, beans, corn and other vegetables, as well as cultivating her subsidiary plot adjacent to the compound, on which

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1. See further, Margaret M. Green, Igbo Village Affairs Chiefly with Reference to the Village of Umueke Agbaja, 2nd edition (1947, London, Frank Cass Ltd, 1964), p. 33; Ford and Jones, 1967, op.cit., p. 13; Equiano, op.cit. p.4; Esther Akpuokwe, "The Role of Women in the Traditional Religion of Nimo and Njokoka Division", (Part Fulfillment B.A. Degree, University of Nigeria, 1976, p.9; Green, Land Tenure in an Ibo Village, p. 34.

2. Men also cut stakes, train the yam vines, build the yam barns, and store the harvest; see generally: Forde and Jones, 1967, op.cit., p.13; Bradbury, The Benin Kingdom, op.cit., pp.23 - 24; Bohannan and Bohannan, The Tiv of Central Nigeria, op. cit., p. 51; Green, Igbo Village Affairs, 1964, pp. 36 - 37, 174 - 175.

3. In some areas it is an offence for women to plant yams, see Meek, Law and Authority..., op.cit., p. 17. Among the Tiv, millet belongs exclusively to women, see Bohannan and Bohannan, The Tiv of Central Nigeria, op.cit. p.18; for the division of labour between the spouses see J. Harris, "Papers on the Economic Aspect of Life Among the Ozu Item Ibo", 14, Africa, 1943-4, pp. 12 - 23, pp. 14-19; Meek, Northern Tribes of Nigeria, pp. 233 - 234.

she might plant cassava, corn, peppers and other vegetables. From her crops, she was expected to supply all, or nearly all, the family's food requirements. Any surplus vegetables, etc., she produced was utilized in the purchase of fish, meat and other items necessary for cooking.

This is the pattern which obtains among many other communities. The Ibibios are primarily cultivators, mainly for subsistence, since the bulk of their wealth is derived from the export of palm-oil products, distributive trading among themselves, and the wage labour of men employed outside their villages.[1] At the present time, staple foods such as yams, cassava, and even green vegetables are brought from as far as Aba for sale locally. Women, who traditionally did most of the farmwork, even the work usually reserved for men in other communities, for example, clearing the bush for farming, have forsaken farming for the more lucrative trading, among many Ibibio communities.

Although the Nupe are primarily farmers, Nupe women do no farm work, and with very few exceptions, no primary productive activity.[2] The Tiv are also mainly farmers, and Tiv women do the planting and weeding.[3]

The wife in such a subsistence agricultural community, had an important economic function. Apart from the yams or millet which the husband contributed, most of the other items of food consumed by the family depended on her labour. Her role as a provider increased with the introduction into many parts of Nigeria of cassava, which the men disdainfully referred to as womens' crops and refused to plant.[4] Yam is a seasonal

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1. See Forde and Jones, op.cit. p.70.
2. See Nadel, A Black Byzantium, pp. 205, 252; Meek, Northern Tribes of Nigeria, p.133.
3. See Bohannan and Bohannan, The Tiv of Central Nigeria, p.51; see also Meek, Northern Tribes of Nigeria, p.133.
4. See Unokanma Okonjo, The Impact of Urbanization on the Igbo Family Structure, (Germany, Gerhard Munch Offsetdruck, 1970), p. 106; Phoebe V. Ottenberg, "The Changing Economic Position of Women Among the Afikpo Ibo", in Continuity and Change in African Cultures, edit. by William R. Bascom and Melville J. Herskovits (London: The University of Chicago Press, Phoenix Books, 9th imp. 1975), p. 215.

crop, and when the year's yield has been consumed, the mainstay of many families is dependent on cassava produced by the wife. When the yam harvest has been reaped, the farm is usually replanted by women with corn and cassava. The family is thus assured of provisions when the yams are finished.

In a word, the wife had a high economic status. In this respect Basden says of the Igbos:

> "In the domestic affairs of life it works out that the menfolk hold themselves responsible for the yam supply, whilst the women provide all the extras, fish oil, peppers and other luxuries; they are the purveyors of the salt and savour of the mens' lives."[1]

With reference to certain cash crops, for example palm-tree products, there was also a division of labour in which the wife had a significant share. The husband usually reaped the palm-nuts,[2] but the wife and young children extracted the palm oil[3] and cracked the kernels.[4] The oil belonged to the husband, but in many societies the wife had the right to claim the kernels. In most cases she sold her husband's oil for him, but she had to account to him for the proceeds. Any money she received for the kernels was her own.[5]

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1. G.T. Basden, Among the Ibos of Nigeria, 1966, p.90; P. Ottenberg, op.cit. pp.36 - 37; Akpuokwe, 1976, p.9. See also Green, Land Tenure in an Ibo Village, op.cit. p.35.

2. The tapping of the palm trees to obtain wine, and the selling of the wine are usually done by men, see Forde and Jones, op. cit. p.14; Cf. the position among the Yorubas, where women usually sell palm wine, see Bascom, The Yoruba of Southwestern Nigeria, p.26.

3. See Nadel, A Black Byzantium, p.234; N.A. Fadipe, The Sociology of the Yoruba, edit. with an Introduction by Francis Olu Okediji and Oladejo O. Okediji, (Ibadan, Ibadan University Press, 1970), p.88.

4. The kernels were almost as valuable as the palm-fruit itself, and were often sold to European factories for export to Europe, see Fadipe, op.cit. p.88; Burns, History of Nigeria, 1969, p.108; 183,000 tons of palm oil and 418,000 tons of palm kernels were exported from Nigeria in 1960.

5. See Green, Igbo Village Affairs, 1964, p.40.

With increased urbanization and attendant social change there was a disruption of rural life, and a resultant shift from agriculture and a divorce from the land. Traditional techniques of production have, in many cases, been abandoned. The hoe and the spade have given way to the machine, the horse and the plough have been replaced by tractors, and the manufacture of palm oil by laborious pounding of the wife at home has yielded to production by sophisticated oil mills, for example, the "Pioneer Oil Mills".

Mair has noted the fact that many people suffer in periods of rapid social change.[1] In the change from the traditional society, where agriculture and primitive methods of production prevailed, to a society primarily engaged in trade, manufacture, governmental and other pursuits common to cities, women have been among the principal losers.

For example, the traditional method of producing palm oil was to boil the fruit, after which it was pounded and the oil extracted by hand.[2] This work was done by women and children. The oil, when extracted, usually belonged to the husband, but the kernels were the wife's.[3] The introduction of oil mills to process the oil from the palm-fruit changed this pattern to the disadvantage of women. In the mass production undertaken by these oil mills, the palm-nuts were sold to them in bulk. The wife thus lost her right to the kernel. In most cases, the entire sum paid for the palm nuts went to the husband.[4] In addition, any profit she might have made by her ability to strike a good bargain when she sold her husband's oil by the retail method in the local markets was also lost, since the mills invariably purchased the palm nuts directly from the husband.

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1. Lucy Mair, Anthropology and Social Change, 1971, p.137.

2. See Nadel, A Black Byzantium, p. 234; William L. Miller, "An Economic Analysis of Oil Palm Fruit Processing in Eastern Nigeria," (Ph.D. dissertation, Michigan State University, 1965).

3. Okonjo, The Impact of Urbanization... pp.111-112; Green, Igbo Village Affairs, pp. 40 - 41; Green, Land Tenure in an Ibo Village, p.20.

4. Igbo women particularly suffered in this respect since it was not usual for the wife to be given the kernels among the Ibibios. Eket informants stated that both nuts and kernel were the sole property of the husbands.

The wife's economic position was therefore adversely affected.[1]

(iii) Trading communities

In those societies where womens' main occupation was trade,[2] the reverse occurred. The economic status of women who were traders was enhanced as a result of the increased variety of goods available, and the national appetite for consumption of such goods. Yoruba women traditionally had a reputation for trading, an aptitude which has been given full rein in the modern society.[3]

Trading has replaced farmwork to a large extent even in those societies where women traditionally never engaged in trading. In fact, trading has become a major occupation among all sectors of the population--professionals and non-professionals, male and female. The huge profits that can easily be made induce many professionals to forsake their chosen professions and to engage in trade.[4]

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1. See Pius Okigbo, "Social Consequences of Economic Development in West Africa" in Africa: Social Problems of Change and Conflict, edit. by Pierre Van Den Berghe, (California Chandler Publishing Co., 1965), p. 417 et al.

2. For e.g., the Yorubas; certain Igbo communities, e.g. Onitsha; the Efiks, mainly in fish and palm oil; and the Nupes.

3. In the 1850's Madam Tinubu, a famous woman trader, was said to be a debtor of over £5,000 advanced to her for palm-oil, by various merchants, see Nigerian Broadcasting Corporation, Eminent Nigerians of the Nineteenth Century: A Series of Studies originally broadcast by the Nigerian Broadcasting Corporation, (Cambridge University Press, 1960), p.37. In 1937, Bascom noted that Yoruba women traders were able to obtain credit running into thousands of pounds sterling for imported goods which they retailed through their associates; see Bascom, The Yoruba of Southwestern Nigeria, p. 26. Since independence the value of their trade has risen considerably; see also P.C. Lloyd, "The Yoruba of Nigeria" in Peoples of Africa, edit. by James L. Gibbs, (New York, Holt, Rinehart and Winston Inc., 1965), p. 548.

4. See also Okonjo, "The Impact of Urbanization..." , p. 126 - 129, Cf. Barbara B. Lloyd, "Education and Family Life in the Development of Class Identification Among the Yoruba" in The New Elites of Tropical Africa, edit. by P.C. Lloyd, (London, Oxford University Press, 1966), p.165: "...only a very few wives of top-level civil servants and politicians can afford the luxury of staying at home"; cf. Green, Igbo Village Affairs, 1964, op. cit. p.13: "Among these people trade is second only to agriculture as a means of livelihood and is one of their ruling passions".

The emergence of "women contractors", a new phenomenon on the Nigerian scene, has further upgraded the economic status of Nigerian women. The introduction of this type of work has to a great extent redressed the imbalance in the economic status of women which resulted from the reduced emphasis on agriculture and mechanisation, since education is not a necessary criterion for success in this field. Illiterate women, devoid of professional skills, execute contracts ranging from the delivery of sand to the building of complex office blocks. Nigerian women have thereby demonstrated their business acumen, enterprise and adaptability to changing circumstances. Every large town has many wealthy women traders and contractors, often referred to as "cash madams".[1]

During field-work for this thesis, primary and secondary school children were asked to write essays on the status of Nigerian women. The economic contributions and status of women were stressed in most essays. It was evident from these answers that wives continue to be the main economic pillars on which the Nigerian family is built, and that many of the children would not have had the opportunity of gaining an education had it not been for the financial contributions of their mothers.

(iv) Professional occupations

In the professional fields, womens' economic position is less favourable. Their inferior level of education has hampered progress in these fields.

A study of Nigeria's professional manpower in selected occupations, conducted in 1963 - 1964 revealed that male persons constituted the overwhelming majority of registered professionals

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1. In this respect, see the reply made by the Nigerian Government to the questionnaire on the role of women in the economic and social development of their countries, issued by the Economic and Social Council of the U.N. in 1967, to the effect that, "although statistics with respect to the activities of gainfully employed women seemed low, such figures did not take into account the very significant role which women played in agriculture, in self-employed activities and in family enterprises", - Participation of Women in the Economic and Social Development of Their Countries, United Nations Publication E CN.6 513, Rev.1, p.7; see also ibid., pp. 53, 65 and 99; and Emmy B. Simmons, Economic Research on Women in Rural Development in Northern Nigeria, O.L.C. Paper No. 10, Sept. 1976, pp. 1 - 3.

being 98.3 percent of the total, while females accounted for only 1.4 per cent.[1]

As table 1:7 below shows, in terms of numbers, females were most notable in the field of medicine, yet there were only six of them registered as doctors, constituting a mere 2.7 percent of that category; and one as dentist, equivalent to 5 percent in the field of dentistry. There were also 4 female mathematicians, equivalent to 7.5 per cent and 4 female economists, constituting 1.5 percent of those registered in that profession. No females were registered in the field of architecture, town-planning, engineering or veterinary science.

TABLE 1:7

ANALYSIS OF REGISTERED PROFESSIONAL MANPOWER BY SEX

Profession	Total	Male		Female		Unspecified	
				No.		No.	
Architects & Town Planners	37	37	100.0	-	-	-	-
Engineers	436	436	100.0	-	-	-	-
Economists	273	269	98.5	4	1.5	-	-
Statisticians	28	27	96.4	1	3.6	-	-
Mathematicians	53	49	92.5	4	7.5	-	-
Accountants & Auditors	186	181	97.3	2	1.1	3	1.6
Doctors	221	215	97.3	6	2.7	-	-
Dentists	20	19	95.0	1	5.0	-	-
Veterinarians	10	10	100.0	-	-	-	-
All Professions	1,264	1,243	98.3	18	1.4	3	0.3

a Source - Lifted from: A Study of Professional Manpower in Selected Occupations, 1964, Table 3, p.10.

1. A Study of Nigeria's Professional Manpower in Selected Occupations; Manpower Study No. 3, Lagos, 1964, p.4.

In the 1963 Census, women constituted a little more than 14 percent of the total number of professional, technical and related workers employed, but in the administrative, executive and managerial grade, of 39,402 persons employed, only 2,665 (or 6.8 percent) were women. Women accounted for 1 percent of 2,299 electrical engineers, 3.2 percent of mechanical engineers, 15.2 percent of the 72 metallurgical engineers, and 1.9 percent of 114 mining engineers.

In the medical field 458 (3.3 percent) out of 13,922 physicians were females; 18 (8.3 percent) out of 217 dentists; and 49 (7.7 percent) out of 639 pharmacists were also women.

TABLE 1:8

EMPLOYED PERSONS BY OCCUPATION; BY SEX, 1963.
PROFESSIONAL, TECHNICAL AND RELATED WORKERS

Occupation	T O T A L		
	Total	Males	Females
Professional, Technical and related workers	440,613	375,066	65,547
Constructional Engineers	2,510	2,417	93
Electrical Engineers	2,299	2,417	24
Mechanical Engineers	1,848	1,789	59
Metallurgical Engineers	72	61	11
Mining Engineers	114	113	1
Surveyors	3,888	3,859	29
Other Engineers	333	331	2
Chemists	556	535	21
Physicists	205	192	13
Industrial Research	19	18	1
Veterinarians	439	411	28
Biologists	780	734	46
Agronomists	2,240	2,200	40
Livestock Specialists	26	26	-
Physicians	13,922	13,464	458
Dentists	217	199	18

cont'd ...

TABLE 1:8 (cont'd ...)

Occupation	T O T A L		
	Total	Males	Females
Medical Research	55	51	4
Nurses	6,183	2,086	4,097
Midwives	2,883	101	2,782
Auxillary Nurses	11,827	3,563	8,264
Pharmacists	639	590	49
Opticians	36	31	5
Medical Technicians	170	144	26
Health Officers	3,338	3,224	114
Dispensary Attendants	825	760	65
Herbalists	41,773	39,336	2,437
Osteopaths	36	31	5
University Teachers	533	466	67
Teachers	205,810	163,490	42,320
Vocational Teachers	1,079	1,015	64
Instructors	48,311	47,756	555
Jurists	3,504	3,370	134
Painters, Sculptors	1,992	1,934	58
Carvers	4,555	4,444	111
Writers	1,412	1,348	64
Actors, Musicians	62,992	60,186	2,806
Draughtsmen	4,617	4,529	88
Accountants	684	670	14
Technical Officers	2,112	2,084	28
Technicians	3,368	3,252	116
Other Professionals	2,411	1,981	430

SOURCE: Population Census of Nigeria, 1963
Table 9, pp. 42 - 43.

As table 1:8 shows, women were predominant only in the field of nursing.

Since 1964, it is safe to assume that the number of female professionals has increased, evidenced by the number of graduates of Nigerian universities, males and females, in the years 1971 - 72, and 1973 - 74, shown below in table 1:9. The disparity nevertheless exists between male and female employment, and is evident even in those professions where one would expect to find more women, for example, teaching in primary school. As table 1.5 shows, males predominate in every stage of the teaching profession from primary school to university.[1]

Although the disparity between male and female professionals still exists in favour of the males, there is some indication that the gap is becoming less wide. For example, 365 students entered the Higher College Yaba, Lagos from 1930 - 1945. All except 2 were men; that is, only 0.6 percent were women.[2] In 1960 the percentage of women in the highest educational institution in Nigeria had risen to 6.3 percent. In that year there were 1,173 male students and 79 female students registered at University College Ibadan.[3] In 1973 - 74, there was a further increase in female participation in higher education. Of 23,228 students enrolled in all Nigerian universities, 3,591, or 15.5 percent were women.[4]

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1. In 1963, there were 446 male university lecturers, compared to 67 female lecturers; see table 1:8, above, pp. 133-134.
2. Report of the Commission on Higher Education in West Africa, Cmd. 6655, par. 26, p. 36; at the end of 1955, 520 students were in residence at University College Ibadan, of whom 21 (4 per cent) were women. See Colonial Report, 1955, p.88.
3. See A. M. Carr-Saunders, New Universities Overseas, (London, George Allen and Unwin, 1961), p. 254.
4. See Table 1:9, p. 136.

TABLE 1:9

STUDENTS ENROLLED IN ALL UNIVERSITIES IN NIGERIA, BY SEX, FIELD OF STUDY, AND LEVEL OF COURSE - ACADEMIC YEAR 1973 - 1974.

Field of Study	Certificate & Diploma Course		Degree		Post-Degree		T O T A L		
	M	F	M	F	M	F	M	F	M-F
Administration	246	34	710	75	189	15	1145	124	1269
Arts	237	56	2656	678	98	19	2991	753	3744
Education	946	383	1555	532	152	44	2653	959	3612
Law	159	28	690	201	14	-	863	229	1092
Social Science	49	11	1994	189	65	7	2108	207	2315
Pure Science	1	3	3283	613	110	12	3394	628	4022
Medicine, Pharmacy, & Nursing	23	12	2302	431	32	3	2357	446	2803
Technology	1	-	2561	59	79	2	2641	61	2702
Agriculture, Forestry, and Veterinary Medicine	38	10	1358	168	89	6	1485	184	1669
TOTAL	1700	537	17109	2946	828	108	19637	3591	23228
GRAND TOTAL	2237		20,055		936		23,228		
Percentage Total	76	24	85.3	14.7	88.5	11.5	84.5	15.5	
Total Percentage 1972 - 1973	79.1	20.9	86.3	13.7	84.6	15.4	85.6	14.3	

Source: Annual Abstract of Statistics, 1974, Federal Office of Statistics, Lagos, Nigeria, p. 159: Percentages added.

E. POLITICAL STATUS

The political status of Nigerian women is less favourable than their economic status. This was so in the traditional society and to a large extent remains true today.

There is evidence that some women in certain traditional societies played an active political role, and a few women rulers are recorded in Nigerian history. As previously noted, Queen Amina of Zaria is famous in Hausa history.[1] Similarly, Queen Kambassa of Bonny is notable in Bonny history as the first and only women to occupy the throne. She was reputed to be an effective ruler whose orders were obeyed by all.[2]

Apart from these few female rules, daughters, mothers sisters and wives of the king or chief have played significant political roles. For example, the mother of the Shehu of Bornu, Ya Magira, and his senior wife, Ya Gumsu, also held fiefs. The fiefs of these female title holders were among the largest in the kingdom, which suggests that these women were particularly influential.[3] Among the Jukun, a minor group of people in Northern Nigeria, the sister of the deceased chief could veto the choice of his successor, and thus control the succession, and the widow of the chief was the counsellor and guardian of the next ruler.

Apart from these women who wielded political influence because of their relationship with the ruler, individual women in certain societies wielded political influence as compared

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1. See above, p. 92.
2. Ebiegberi J. Alaboa and Adadonye Fombo, A Chronicle of Grand Bonny, (Ibadan: Ibadan University Press, 1972), p.18; see also Eminent Nigerians of the Nineteenth Century, 1960, a series of studies originally broadcast by the Nigerian Broadcasting Corporation, for details of Madam Tinubu who was reputed to be the power behind the throne of King Akitoye of Lagos, and his successor, King Donsunmu.
3. See Louis Brenner, The Shehu of Kukawa, 1973, p.91. These ladies were not officially recognized by the British in Bornu, although at one time it was proposed that they be ranked as second class chiefs and given staves of office; see Askell Benton, The Sultanate of Bornu, p. 173.
4. See Hatch, Nigeria: A History, 1971, p. 37, Meek, Northern Tribes of Nigeria, Vol. I, p. 256.

with political power. For example, among the Yorubas, although women were not associated with the political process on the same basis as men, through the institution of the Iyalode, the woman delegated as their political leader and spokesman in government, they did have a channel of direct participation in politics. Fadipe points out that:

> "although the views of the Iyalode were generally solicited with regards to business which was being discussed in the council, she usually deferred to the superior judgment of the males."[1]

A similar arrangement to the Yoruba Iyalode institution existed among Onitsha Igbos, where the Omu or queen presided over the organization of women of Onitsha (Ikporo Onicha), to which all women who are, or have been married, belong. Her role paralleled that of the king and she was usually referred to as queen by European observers, but she was not the king's wife, nor was she usually closely related to him. She was elected by the king (Obi) to represent the womens' viewpoint in the king's Council of which she was a member. The important criterion for choice of Omu was proven ability for leadership. She had women chiefs similar to those of some male chiefs, whose chief duties were to look after the public affairs of the women generally, to ensure that womens' organizations were peacefully run, to supervise village markets, settle disputes among the women, to ensure strict observance of customary law among the women, and to render social and political services.[2]

In spite of representation in decision-making Councils, womens' influence in the traditional society was minimal. Among the Igbos and most other communities, village assemblies, the centre of political authority, were mens' affairs, although there is evidence that women could use their combined political strength to effect their purpose when necessary. Ibo, Ibibio and Yoruba women all have shown considerable ability in using politics when

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1. N. A. Fadipe, The Sociology of the Yoruba, 1970, op.cit., p.253; A. K. Ajisafe, The Laws and Customs of the Yoruba People, (London, Routledge and Sons Ltd., 1924), pp. 19 - 20.

2. Information given in a recorded interview with P. O. Anatoga, the Onowu of Onitsha, on 19th July 1977, at Onitsha; and with Chief I. A. Mbanefo, the Odu of Onitsha, on 8th August, 1977.

their economic interest is threatened,[1] or to further their trading interests. An example of this is evident in the Aba riots of 1929, when the women revolted against the colonial authorities following rumours that they were to be taxed.[2] These riots resulted in the death of thirty-two women (and thirty-one were wounded) and led to a series of Commissions of Enquiry[3] as well as anthropological investigations as to their probably causes.[4] On a smaller scale were the disturbances caused by the wives of miners at the Enugu colliery. The sole cause of complaint seemed to have been that their menfolk were not being paid money which was due to them. The disturbances created by the wives were dubbed as an attempt to bolster the claims of the miners. It was alleged that the women had no political aim, but they caused a great deal of damage to property and there was some shooting.[5] Margaret Ekpo, the well-known Nigerian politician, played an active part in this riot and

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1. See Margaret Peil, "Female Roles in West African Towns", in Changing Social Structures in Ghana (edited J. Goody) 1975.

2. Information collected by the present writer among the Ibibios, at Eket and Calabar, and informants from Aba who actually took part in the riots clearly showed that the riots were instigated and stage-managed by the men who hoped to achieve certain reforms. The women were prompted to act, in the belief that the Colonial Authorities would not harm them, since in accordance with the tradition of the Ibibios, women were never killed in warfare, and on many occasions they acted as peacemakers in tribal wars.

3. See the Reports of the Aba Commission of Inquiry - Sessional Papers of the Nigerian Legislative Council, Nos. 12 and 28 of 1930, and the Minutes of Evidence - Gazette Extraordinary, 7th February 1930.

4. See Margery Perham, Native Administration in Nigeria, 1937; also Sylvia Leith-Ross, African Women: A Study of the Ibo of Nigeria, 1959, pp. 22 - 39.

5. During the disturbances, 21 persons died, 51 were wounded and 29 of the wounded were admitted into hospital. - See Report of the Commission of Enquiry into the Disorders in the Eastern Provinces of Nigeria, No. 1949, No. 256 (His Majesty's Stationary Office, London).

was alleged to have made "inflammatory and mischievous speeches".[1]

In the Nigerian Legislative Council Debates in 1948, several members commented on the fact that except for Lagos and Port Harcourt where women had limited franchise, women (even those who were liable to pay income tax) were prevented from voting. They referred to the system as "unfair" and "unreasonable", and one member observed as follows:

> "The women of Nigeria deserve better consideration than what they are having today. In some parts of the country they are taxed, but some of them are not like cows, which are usually patient and allow themselves to be milked; rather some of them are behaving like mules and are beginning to kick."[2]

Women in the South were allowed to vote during the first Republic, although Moslem women in the North were denied the right to vote in national and local elections. In the 1976 Local Government elections, all women were allowed to vote on an equal basis with men, and women in purdah turned out in such large numbers to vote that polling stations had to extend their closing time by two hours.[3]

Even though there is now no legal bar to womens' participation in politics, their general non-involvement in politics in the traditional society has been a hindrance to effective participation in politics in modern Nigeria, although they have been utilized by men to further the latter's political aims and ambitions. As O'Bar rightly points out, "Women remain invisible in politics except when they seem to burst sporadically onto

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1. See the Report of the Commissions of Enquiry into the Disorders in the Eastern Provinces of Nigeria, November, 1949, No. 256, op.cit. Jones asserts that the first recorded instance of women being used for political demonstration in Nigeria was around 1855, when King Dappo and other Chiefs promoted a hostile demonstration of market women against the super-cargoes (traders) in Calabar. The main reason seems to have been to demonstrate their resentment against the decision of the Court of Equity which held that Yanibo did not belong to the Anna Pepple House but to William Dappa Pepple House; see further G.I. Jones, The Trading States of the Oil Rivers: A Study of Political Development in Eastern Nigeria, 1963, p.125.
2. Legislative Council Debates, 10 March 1948, pp. 438 - 439.
3. See West Africa, 20 December 1976.
4. Jean F. O'Bar, "Making the Invisible Visible: African Women in Politics and Policy", African Studies, Vol. XVIII, No. 3, 1975, p. 22.

the larger scene".[1]

Peil notes that "Nigerian women have been more politically active than women in most developing countries".[2] The present writer found women in Nigeria totally uninterested in active politics. It was evident from the statements of informants that they were disillusioned by the men's political performance and the brutal tactics adopted by some politicians during the first Republic.

This attitude is unfortunate as it leaves the men a clear field to make laws detrimental to the status of women, especially in marriage and family life, although most of the main political parties, in recognition of the potential voting strength of Nigerian women, now that Moslem women are also allowed to vote, have made an issue of the question of womens' rights in their political campaigns.[3]

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1. Margaret Peil, Nigerian Politics: The People's View, (London, Cassell, 1976), pp. 13.

2. See Amma Ogan, "The Wooing of Women", Daily Times of Nigeria, 29 March, 1979, p. 3.

3. In this respect see the Constitution of the Federal Republic of Nigeria, 1978, and below Chapter II, pp. 148-156.

CHAPTER II

THE FAMILY AND THE LAW IN NIGERIA

1. The Constitutional and Judicial Background

A. Federal and State legislative powers

It has been mentioned previously that Nigeria is now a Federal Republic of nineteen States and a Federal Capital Territory.[1] When the country became a Federal Republic on 1 October, 1963, it was given a constitution which apportioned legislative powers between the Federal Government and the then Regional (now State) Governments.[2] The 1963 Constitution contains an Exclusive Legislative List of subjects upon which the Federal Parliament has exclusive powers to make laws, and a Concurrent Legislative List of subjects upon which the Federal, or a State Parliament could legislate.[3] The States have exclusive jurisdiction to legislate on those subjects which are not included in either of the legislative lists.

With special relevance to marriage, the 1963 Constitution provides that the Federal Parliament shall have exclusive power to make laws with respect to

> "Marriages other than marriages under Moslem law or other customary law, annulment and dissolution of, and other matrimonial causes relating to, marriages other than marriages under Moslem law or other customary law."[4]

Marriages other than marriages under Moslem law or other customary law refers to marriage contracted

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1. See above, Chapter I, p. 78. For the definition of the Federal Capital Territory, see Constitution of the Federal Republic of Nigeria (Enactment) Decree, 1978, First Schedule, Part II.
2. The Constitution of the Federal Republic of Nigeria, 1963, No. 20 of 1963.
3. Ibid., s. 69.
4. Ibid., Item 23, Exclusive Legislative List.

under the Nigerian Marriage Act (statutory marriage).[1]

This provision gave rise to uncertainty as to the precise scope of the Federal Government's legislative powers.[2] Did the Federal Government have exclusive power to make laws affecting the relationships of husband and wife, and parent and child, of a statutory marriage, including rights and duties of the spouses, and property rights, especially rights of succession as between husband and wife, and parent and child; or was the legislative powers limited to the creation, annulment and dissolution of marriage, leaving to the States' legislatures the right to regulate the incidents of a statutory marriage; or, as posed by Kasunmu and Salacuse, in Nigerian Family Law,[3] was the legislative power of the Federal Government merely "to establish the conditions and formalities necessary for a man and woman to become husband and wife?"

In 1956, the former Eastern Region of Nigeria enacted the Age of Marriage Law,[4] which made a marriage, or promise or offer of marriage between, or in respect of persons, either of whom is under the age of sixteen, void. Section 2 of this statute stated:

> "In this Law 'marriage' includes a marriage contracted under the provisions of the Marriage Ordinance and a marriage according to customary law"[5]

This Law was patently invalid, insofar as it attempted to legislate on the formation and annulment of a statutory marriage, matters reserved for the Federal Parliament in the Exclusive Legislative List.[6] In fact, the Eastern Region Legislature seemed to be unaware of the fact that it had no competence to legislate on statutory

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1. See above, Chapter 1, p.58, n.5
2. See e.g. Alfred B. Kasunmu and Jeswald W. Salacuse, Nigerian Family Law, (London, Butterworths, 1966) pp.2-6.
3. Kasunmu and Salacuse, op.cit., p.3.
4. Eastern Region, No. 22 of 1956.
5. Ibid., s.2.
6. See Kasunmu and Salacuse op.cit., pp.4-5 cf. E.I. Nwogugu, Family Law in Nigeria, (Ibadan: Nigeria, Heinemann Educational Books (Nigeria) Ltd., 1974), p.42.

marriages. For example, the Minister for Welfare, in introducing the second reading of the Bill of the Age of Marriage Law, 1956, in the former Eastern House of Assembly, stated that it was a "Bill for a Law to make void all marriages between persons under the age of sixteen",[1] and, in the debate on Limitation of Dowry Law, 1956,[2] the same Minister drew the attention of the House to the fact that the Bill was limited to customary marriages. He said:

> "Honourable members will note that marriages, under the Marriage Ordinance, have been excluded from the provisions of this Bill. Those who get married under the Marriage Ordinance are usually educated and comparatively well-off. They can look after themselves. It would not be fair to insist upon limiting incidental expenses to £5 when the cost of an engagement might be much more. Expenses of the Church ceremony and the wedding reception could not be limited to £5".[3]

None of the Members of the House pointed out the pertinent fact that it was not within the legislative competence of the House to legislate on statutory marriages.

The Age of Marriage Law, 1956, was amended and limited to customary marriages only, in the revised Laws of Eastern Nigeria, 1963.[4]

Some of the difficulties of interpretation of the constitutional provision (quoted above) are rendered obsolete by the Matrimonial Causes Decree, 1970[5] which provides:

> "The Federal Military Government hereby decrees as follows:
>
> Part I - Jurisdiction
>
> (i) After the commencement of this Decree a matrimonial cause shall not be instituted otherwise than under this Decree, and if a matrimonial cause has been instituted before

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1. See Eastern Region Parliamentary Debates, Eastern House of Assembly, 1956 (Enugu, Government Printer), Vol.II, p. 671.
2. Cap 6, Laws of Eastern Nigeria, 1963 Revision.
3. Eastern Region: Debates, Eastern House of Assembly 1956, op.cit. p.674.
4. Cap 6, Laws of Eastern Nigeria, 1963 Division.
5. No. 18 of 1970.

the commencement of this Decree but not completed, it shall be continued and dealt with only in accordance with the provisions of this Decree prescribed in that behalf".

Section 114(1) of the Decree provides that "matrimonial cause" means:

"(a) proceedings for a decree of (i) dissolution of marriage, (ii) nullity of marriage. (iii) judicial separation, (iv) restitution of conjugal rights or (v) jactitation of marriage;

(b) proceedings for a declaration of the validity of the dissolution or annulment of a marriage by decree or otherwise or of a decree of judicial separation; or for a declaration of the continued operation of a decree of judicial separation, or for an order discharging a decree of judicial separation;

(c) proceedings with respect to the maintenance of a party to the proceedings, settlements, damages in respect of adultery, the custody or guardianship of infant children of the marriage or the maintenance, welfare, advancement or education of children of the marriage, being proceedings in relation to concurrent, pending or completed proceedings of a kind referred to in paragraph (a) or (b) above, including proceedings of such a kind pending at, or completed before, the commencement of this Decree;

(d) any other proceedings (including proceedings with respect to the enforcement of a decree, the services of process or costs) in relation to concurrent, pending or completed proceedings of a kind referred to in paragraph (a), (b) or (c) above, including proceedings of such a kind pending at, or completed before, the commencement of this Decree; or

(e) proceedings seeking leave to institute proceedings for a decree of dissolution of marriage or of judicial separation, or proceedings in relation to proceedings seeking such leave".[1]

The States, therefore, are not competent to enact laws dealing with a "matrimonial cause" as defined

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1. Matrimonial Causes Decree, 1970, No. 18 of 1970, s. 114(1).

in the Decree, in relation to a statutory marriage.

The division of legislative powers between Federal and State Governments has been retained by the new Constitution of the Federal Republic of Nigeria, 1979.[1] In relation to marriage the new Constitution provides that the National Assembly shall have exclusive powers to make laws in respect of

> "The formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial causes relating thereto".[2]

This provision is more precise than its predecessor, and is in accordance with the Matrimonial Causes Decree, 1970. It should be noted that the two statutes do not entirely deprive the States of legislative power in relation to statutory marriage. The States may legislate on matters which do not come under the definition of "matrimonial cause", for example, rights of succession between the spouses, and between parent and child, of a statutory marriage.

The Constitution of the Federal Republic of Nigeria (Enactment) Decree, 1978, which is due to come into force on 1 October, 1979,[3] provides as follows:

> "(7) The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say -
>
> (a) any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution;
>
> (b) any matter included in the Concurrent Legislation List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto;

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1. Section 4, Constitution of the Federal Republic of Nigeria (Enactment) Decree 1978, Decree No. 25 of 1978.
2. Ibid., Item 58, Exclusive Legislative List, Second Schedule, Part I.
3. Section 279 (1) Constitution of the Federal Republic of Nigeria (Enactment) Decree, 1978.

(c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution".[1]

Marriage under Islamic and customary laws are not included in either the Exclusive or Concurrent Legislative Lists, and are, therefore, within the exclusive jurisdiction of the States.

To summarize, the National Assembly has exclusive power to legislate on the formation, annulment and dissolution of statutory marriage, including "matrimonial cause" as defined by the Matrimonial Causes Decree, 1970. A State Assembly has exclusive power to make laws with reference to customary and Islamic law marriages within the State, as well as on certain ancilliary matters, not included in the definition of "matrimonial cause", in relation to statutory marriage.

B. Fundamental rights and directive principles

(1) Introduction

"Fundamental rights" were first introduced into the Nigerian constitution as a result of the recommendations of the Commission appointed in 1958, to enquire into the fears expressed by ethnic minorities in Nigeria, and to make recommendations as to the means of allaying them.[2] Since 1960, the fundamental rights entrenched in the constitution have remained unaltered, in spite of criticisms of their inadequacies.[3] The Constitution Drafting Committee appointed by the Federal Military Government in 1975, to produce a draft constitution for Nigeria, took

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1. Ibid., s.4 (7).
2. See Report of the Commission Appointed to Enquire into the Fears of Minorities and the Means of Allaying them, Cmd. 505, London, 1958.
3. See Report of the Constitution Drafting Committee containing the Draft Constitution, (Ministry of Education and Information Printing Division, Enugu, 1977), Vol. 1, p. XV.

note of these criticisms, and made certain recommendations.[1]

As a result of the Committee's recommendations, an improved chapter of "Fundamental Rights", as well as a separate Chapter, which imposes the duty and responsibility on all organs of government, and on all authorities and persons exercising legislative, executive, or judicial powers, to conform to, observe and apply certain fundamental objectives and directive principles of State policy, were enshrined in the Constitution of 1979.[2]

Some of these "fundamental rights" and "directive principles", are of vital importance to the status of women. This section examines a few of the legal implications inherent in some of these provisions, with particular reference to women.

(II) Right to freedom from discrimination

This is the most important provision, so far as the legal rights and obligations of women in marriage are concerned. The right to freedom from discrimination is entrenched in the Chapter on "Fundamental Rights", and reads as follows:

> " 39.- (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, religion, sex or political opinion shall not, by reason only that he is such a person -
>
> (a) be subjected either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion, or political opinions are not made subject; or
>
> (b) be accorded either expressly by, or in the practical application of any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions".[3]

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1. Ibid., p. XV - XVIII
2. Constitution of the Federal Republic of Nigeria, (Enactment) Decree 1978, Chapter II, ss.13-22, and Chapter IV.
3. Ibid., s.39(1).

Closely connected to this provision is the statement on social objectives which is inserted in the Chapter on "Fundamental Objectives and Directive Principles of State Policy", which provides:

" 17 (1) The State social order is founded on ideals of Freedom, Equality and Justice.

(2) In furtherance of the social order -

(a) every citizen shall have equality of rights, obligations and opportunities before the law, ..."[1]

These two provisions revolutionize the legal status of Nigerian women in general, and of married women in particular.

As will be abundantly shown in subsequent chapters, women married according to customary or Islamic law only, suffer from several discriminations based solely on the ground of sex. The legal rights and obligations of wives are, in many respects, inferior to those of their husbands. To illustrate the legal discrimination between male and female, the following principles of law may be briefly mentioned.

(a) The practice of polygyny. Under the customary laws of all Nigerian communities, as well as under Islamic law, a husband is entitled to marry multiple wives at the same time. A wife is not permitted to marry more than one husband at a time. In other words, while polygyny is permissible, polyandry is prohibited.[2]

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1. Compare these provisions, and the proposed "Equal Rights Amendment" to the United States Constitution, now pending ratification by the necessary three-fourths of the States' legislatures: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex".

2. Certain types of polyandry, previously found in some of the Northern communities, e.g. the Rukuba of Benue State, were abolished by local Declarations of law, see for example, Declaration of Borgu Native Law and Custom Relating to Marriage and Divorce, N.A.L.N, 52, 1961, s.6 : "There shall be no statutory limit to the number of wives a man may have at one time (2) It shall be an offence for a woman to have more than one husband at a time".

(b) Divorce. In many communities, a husband can divorce his wife at will, but she is not legally entitled to divorce him, unless he consents to her doing so. This is especially the case among Moslem communities in the Northern States of Nigeria,[1] but is not unknown to some systems of customary law in the Southern States.[2]

(c) Succession. Women suffer discriminations in the large majority of communities, solely on the ground of sex. In most systems of customary law, girls are deprived of all rights of succession to property, especially in the case of their father's property, and in relation to land. In Islamic law, males inherit twice as much as females in similar circumstances.[3] In some communities, husbands inherit from their wives, but not vice versa.

(d) Right to own and dispose of property. A wife's right to own and dispose of property is severely restricted in some systems of customary law, and in a few communities, women have no legal capacity to own or dispose of property, even if they are unmarried adults.[4] A wife's right of disposal of property is also limited under Islamic law.[5]

(d) The dowry system. Under this system a man pays money or transfers other property to the parents or legal guardian of his prospective bride. Such payments must be refunded by the wife, or her family, if there is a divorce. This acts as a barrier to the wife's freedom to effect a divorce. No payment is made on behalf of a man, and consequently, it is easier for him to

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1. See further, below, Chapter IX, pp. 82-88.
2. See e.g. Solomon v Gbobo [1974] 4 E.C.S.L.R. 457, Forde, Yoruba-Speaking Peoples, op. cit., p. 28.
3. See generally Chapter XIII, below, pp. 469-470.
4. See The Customary Law Manual: A Manual of Customary Laws Obtaining in the Anambra and Imo States of Nigeria, (Government Printer, Enugu, 1977), p. 8, ss. 12(1), 12(2) and 328.
5. See further, Chapter XIII generally.

divorce his wife, than it is for her to divorce him.

(f) Inequality in tax provisions. Apart from customary and Islamic laws, there are also some statutory provisions which discriminate against wives. For example, under the Income Tax Management Act, 1961,[1] as amended by the Income Tax Management (Uniform Taxation Provisions, etc.) Decree, 1975[2], a husband is given a tax allowance for his wife, who lives with him, or who is maintained by him, whether or not she is actually dependent on him. A wife, on the other hand, is given no allowance for her husband, even in cases where he is totally dependent on her financially.

These are only a few of the many discriminatory provisions of customary and Islamic laws. Further instances of discrimination will emerge in future chapters.

What is the effect of the constitutional provisions quoted above on the legal status of women? There is no doubt that many of the discriminatory provisions of customary and Islamic laws as well as discriminatory statutory provisions infringe the fundamental rights provision of the 1979 Constitution. If women enforce their constitutional right of freedom from discrimination on the ground of sex, with respect to marriage and family life, customary and Islamic law marriages would be completely revolutionized and brought into conformity with the provisions of the Marriage Act,[3] and the Matrimonial Causes Decree, 1970,[4] under which the spouses have equal rights and obligations as far as possible.

The catastrophic effect of the provision of equality on the ground of sex, on customary and Islamic law marriages, was recognized by the Constitution Drafting

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1. No. 21 of 1961, Laws of the Federation of Nigeria.
2. Decree No. 7 of 1975, s.20A, The Decree came into force on 1 April, 1974.
3. Cap 115, Laws of the Federation of Nigeria, 1958 Revision.
4. Decree No. 18 of 1970.

Committee, which was appointed by the Federal Government to produce a draft constitution for Nigeria. The draft constitution this committee submitted to the Supreme Military Council provides as follows:

> "All citizens, male and female, shall have equality of rights, obligations and opportunities before the law but this provision shall not abrogate any rule of Moslem or customary law".[1]

The reason given by the majority of members for the proviso on equality of rights and obligations between the sexes was that "ideas which have been embodied in rules of Islamic law or customary law are part of the religious or cultural heritage of the various peoples concerned, and have been accepted as binding for a very long time". They were of the opinion that a change "would unnecessarily outrage the religious or cultural ideas of most Nigerians".[2] The view of the minority of members to the effect that the reservation about Islamic and customary law may involve constitutional protection for rules of conduct which may be wholly indefensible, and which do not deserve to be so protected, was rejected by the majority of members.

Not only were equal rights between male and female limited to exclude Islamic and customary laws, but the draft constitution submitted by the Committee also omitted the word "sex" in the section on the right to freedom from discrimination.[3] In other words, the Constitution Drafting Committee recommended that a right to freedom from discrimination should be entrenched in the constitution, but that an exception on the grounds of sex should be specifically preserved.

Fortunately, both recommendations of the Committee were rejected by the Supreme Military Council, and for the

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1. Report of the Constitution Drafting Committee, 1977, par. 313, p. VII.
2. Ibid., p. VII - VIII.
3. See The Draft of a Constitution for the Federal Republic of Nigeria, 1977, S.35(1)(a).

first time in the history of Nigeria, women have been given constitutional equality of legal rights and obligations with men, including equal rights and obligations under customary and Islamic laws.

To insert an equal rights provision in a constitution is one thing, interpretation, application and enforcement of the rights may prove more difficult. Certain pertinent questions arise: Are laws based on the physical characteristics of one sex necessarily discriminatory? In other words, is total legal assimilation on the grounds of sex possible, or desirable, bearing in mind that certain physical characteristics are unique to one sex. For example, under the Labour Code Decree 1974,[1] a woman is entitled to certain maternity benefits, including leave benefits, and partial payment of salary during her confinement. Men are not entitled to such benefits. Similarly, where a woman by any wilful act or omission causes the death of her child under the age of twelve months, due to the fact that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child, or by reason of the effect of lactation consequent upon the birth of the child, she may be found guilty of manslaughter, instead of murder, which carries a greater penalty on conviction.[2] No similar concession is given to a man.

Is legislation of this kind a denial of the right to freedom from discrimination, of the other sex? How would the courts interpret such laws?

Another important question is: how can a woman enforce her rights to equality and freedom from discrimination under the fundamental rights provision of the constitution?

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1. Decree, No. 21 of 1974, SS.53, 54, and 55; see Okunbowa v. Group Consultants Nigeria Project Advisers Ltd. and Anor. [1974] 2 CCHCJ. 159.

2. Criminal Code Act, 1916, Cap 42, Laws of the Federation of Nigeria, 1958 Revision, s.327; cf. the English Infanticide Act, 1938, s.1(1).

Section 42 of the Federal Constitution of Nigeria (Enactment) Decree, 1978 provides for the enforcement of the Chapter on "Fundamental Rights" as follows:

"42 - (1) Any person who alleges that any of the provisions of this Chapter has been, or is being, or is likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.

(2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement, within that State, of any rights to which the person who makes the application may be entitled under this Chapter.

(3) The Chief Justice of Nigeria may make rules with respect to the practice and procedure of High Court for the purposes of this section.

(4) The National Assembly -

(a) may confer upon High Courts such powers in addition to those conferred by this section as may appear to be necessary or desirable for the purpose of enabling those courts more effectively to exercise the jurisdiction conferred upon them by this section; and

(b) shall make provisions -

(i) for the rendering of financial assistance to any citizen of Nigeria where his right under this Chapter has been infringed, or with a view to enabling him to engage the services of a legal practitioner to prosecute the claim; and

(ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real."

This provision may be useful in many cases. For example, a daughter who has been deprived of inheritance rights to the intestate estate of her deceased father, solely on account of her sex, may effectively enforce her rights under section 39(1) of the Constitution, by taking advantage of the procedure under section 42. Similarly, in cases where, under customary law, a wife's property legally belongs to, or is subject to the control of her

husband, there would be no serious difficulty in a wife enforcing her right to own and dispose of her separate property to the same extent as her husband can, under this provision.

The enforcement of some rights, however, even if they satisfy the provision of being "substantial"[1] may prove more difficult. An obvious example relates to the practice of polygyny. How is a wife under customary or Islamic laws to enforce her equality of rights in this respect? Can she compel the State to alter customary and Islamic laws to give her the legal right to practise polyandry, or can she obtain an injunction to prevent her husband from exercising a legal right which is denied to her? What is the position if her husband is already a polygynist before the Constitution comes into force some time in 1979?

This, and similar difficulties in enforcing certain rights, make the right of freedom from discrimination on the ground of sex, as provided by the 1979 Constitution, a nebulous one, especially in relation to marriage and family life. The difficulty of enforcing certain rights, however, should not detract from the salutary effect of the constitutional provisions on the legal status of women. Nigerian women have gained, without the slightest struggle or protest, what American women have been fighting for unsuccessfully,for nearly a century,[2] and what, after a similar lengthy struggle, English women only achieved in

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1. See Constitution of the Federal Republic of Nigeria (Enactment) Decree, 1978, s.42(4)(b)(ii).

2. During the final quarter of the twentieth century, the U.S. is still debating whether men and women should have equal rights under the Constitution. The "Equal Rights" amendment to the United States Constitution, which would ensure equality of rights between men and women, was first introduced in Congress in 1923. It has been introduced in every Congress thereafter. It was approved on 22 March, 1972 by the 92nd Congress, and submitted to the States for ratification. Twenty-one states, whose legislatures were in session, voted for ratification within six months of submission. By the end of 1974, more than thirty states had ratified the amendment, but in July, 1978, only 35 of the needed 38

Footnote continued.....

1975[1] - abolition of sex discrimination in relation to rights, obligations and opportunities before the law.

(III) Right to intermarry

Also relevant to the status of women is section 15 of the Federal Constitution of Nigeria (Enactment) Decree 1978 which provides:

"15 - (1) The motto of the Federal Republic of Nigeria shall be Unity and Faith, Peace and Progress.

(2) Accordingly, national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, religion, sex status ethnic or linguistic association or ties shall be prohibited.

(3) For the purpose of promoting national integration it shall be the duty of the State to ....

(c) encourage intermarriage among persons from different places of origin, or of different religious, ethnic or linguistic association or ties....."[2]

This provision is particularly important in relation to the Moslem States of the north. Under Islamic law, a Moslem woman is prohibited from marrying a non-Moslem man, and a Moslem man cannot marry a pagan woman.[3] Unlike section 39 of the Constitution, however, no provision is made to force a State to perform its duty under this section, and it is unlikely that any Moslem State would voluntarily alter Islamic law in this respect. There is

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Footnote 2 continued - States had approved the amendment passed by Congress in 1972. The time limit for ratification expires in March, 1979, see Daily Times, 10 July, 1978, Marguerite Rewalt, "The 'Equal Rights for Men and Women Amendment' is Needed", Women Lawyers Journal, Vol. 59, Winter 1973, pp. 4-10; Martha W. Griffiths, "Status of Women", Women Lawyers Journal, Vol.60, Fall 1974, pp.208-211; U.S. Congress Senate, Women and the Equal Rights Amendment; Senate Sub-committee Hearings on the Constitutional Amendment, 91st Congress, edit. by Catherine Stimpson (New York and London: Bowker Co., 1972), pp. XIII-XVI.

1. See the English Sex Discrimination Act, 1975, C.65.
2. Constitution of the Federal Republic of Nigeria (Enactment) Decree 1978, S.15(3)(c).
3. See Asaf A. Fyzee, Outlines of Muhammadan Law, 4th edit. (Delhi, India, Oxford University Press, 1974), pp.96-101.

Footnote continued.....

no legal bar to intermarriage under customary law.[1]

C. The judicial system

(1) Introduction

The judicial system varies to some extent in the Northern and Southern States, and only a brief discussion of the structure and jurisdiction of the courts in each part of the country is possible here.[2] The courts mentioned below are particularly relevant to marriage.

(II) Courts in the Southern States

In the Southern States, there are mainly two types of courts:

(a) Customary Courts. Customary Courts have unlimited and exclusive jurisdiction in matrimonial matters between persons married under customary law. They have no jurisdiction over the spouses of a statutory marriage, so far as matrimonial matters are concerned.

Except in the Western States, judges in these courts are not legally trained lawyers, but local people, men, and occasionally women,[3] with a good knowledge of the customary laws of the respective areas.

Footnote 3 continued - Abdur Rahim, The Principles of Muhammadan Jurisprudence: According to Hanafi, Maliki, Shafi'i and Hanbali Schools, (London: Luzac and Co., 1911), p. 329; Faiz B. Tyabji, Muhammadan Law: The Personal Law of Muslims, (Bombay: N.M. Tripathi and Co. 1940), p. 142.

1. See further, below Chapter V, pp. 412-415.

2. See further, E.A. Keay and S.S. Richardson, The Native and Customary Courts of Nigeria, (London: Sweet and Maxwell, 1966); B.O.Nwabueze, The Machinery of Justice in Nigeria (London: Butterworths, 1963), pp. 45-106; F. Olawale, T. Elias, Groundwork of Nigerian Law (London: Routledge and Kegan Paul, Ltd., 1954), p. 37-163; Omoniyi Adewoye, The Judicial System in Southern Nigeria 1854-1954; Law and Justice in a Dependency (London: Longman, 1977).

3. Of the Customary Courts visited during field-work, only Eket Customary Court had a female judge sitting on the panel of judges.

(b) Non-Customary Courts. These courts are not indigenous to Nigeria. They were introduced by the British, and are modelled on courts operating in England to some extent. They are:

(i) Magistrates Courts.
(ii) High Courts.
(iii) Federal Court of Appeal.
(iv) Supreme Court of Nigeria.

Generally, these courts have no jurisdiction over customary marriages, except on appeal from a Customary Court. In 1971, Customary Courts were abolished in the former East Central State, and their jurisdiction was given to Magistrates Courts.[1] In 1974, original jurisdiction over customary marriages was extended to the High Courts of the former East Central State.[2]

Under the Matrimonial Causes Decree, 1970, the High Courts of each State in the Federation have exclusive jurisdiction over statutory marriages, and "matrimonial cause" in relation to statutory marriage.[3]

Previous to 1976, only the former Western State had a Court of Appeal - the Western State Court of Appeal.[4]

In 1976, a Federal Court of Appeal, with exclusive jurisdiction to hear appeals from the High Courts of every State in the Federation, was established.[5] The Federal Court of Appeal sits in Lagos, and branches of the Court are empowered to sit in Kaduna, Enugu, Ibadan, and Benin, and in such other places as may be designated.

The Supreme Court is the final court of appeal in the country, for all types of marriages.

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1. Magistrates Courts Law (Amendment) Edict, 1971, S.17(1)(b), No. 23 of 1971 of the former East Central State.
2. High Court Law (Amendment) Edict, 1974, No.12 of 1974, S.14(1).
3. Matrimonial Causes Decree, 1970, No. 18 of 1970, S.1(1).
4. Court of Appeal Edict, 1967, W.R.N.L.N., 19 of 1967, W.S.L.N. 80 of 1973. The Western State Court of Appeal was abolished by Constitution (Amendment) (No.2) Decree, Decree No. 42 of 1976.
5. Constitution (Amendment) (No.2) Decree, 1976, No. 42 of 1976.

(III) Courts in the Northern States.

The corresponding courts in the Northern States are:

(a) Customary Courts. The Area Courts and Upper Area Courts have exclusive jurisdiction over Islamic law marriages, and matrimonial causes, with appeal to the Sharia Courts of Appeal in all cases involving questions of Moslem personal law, including questions relating to the dissolution of marriage, or regarding family relationships, or the guardianship of an infant where all the parties to the proceedings are Moslems.

(b) Non-customary Courts.

(i) Magistrates Courts.
(ii) High Courts.
(iii) Federal Court of Appeal.
(iv) Supreme Court of Nigeria.

These courts have a similar jurisdiction as the corresponding courts in the Southern States, as stated above.

(IV) Recent reforms in Area and Customary Courts.

It has been mentioned previously[1] that Customary Courts were abolished in the former East Central State, and in a few other States of the Federation. As a result of the hardship which resulted in 1976, the Federal Military Government appointed the Customary Courts Reform Committee to consider, inter alia, the need for the existence of Customary Courts, and, in particular, the need for their existence in the States in which they had ceased to function.

In September, 1976, also, the Area Courts Reform

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1. See above p.158.

Committee was appointed, with almost identical terms of reference.[1]

Both committees found overwhelming support for the retention of customary and area courts, and for their reinstatement in those Southern States where they were inoperative.[2] Reasons for the retention of Customary Courts given by the Reform Committee included the fact that they deal with 80 percent[3] of the judicial work in every State, encompassing 85 percent[4] of the population. Abolition would, consequently, result in increased workload in the Magistrates' Courts.[5] The fact that the procedure is informal and uncomplicated, and that generally there is no legal representation, which means that costs to the litigant are comparatively low, were additional reasons for the retention of customary courts. The reasons apply equally to the retention of area courts.

The Federal Government accepted the recommendations of both committees for the retention of customary and area courts, and directed that those States, viz. Anambra, Bendel, Imo and Rivers States, where Customary Courts had ceased to function, should re-introduce these courts.[6]

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1. See the White Paper on the Federal Military Government's Views on the Report of the Customary Courts Reform Committee, [1978] and Report of the Area Courts Reform Committee [1977].
2. See Report of the Customary Courts Reform Committee, par. 2.
3. C.C.R.C., ibid., 22.
4. C.C.R.C. ibid., 23.
5. Ibid., 34(a); see also Adrian Collett, "Recent Legislation and Reform Proposals for Customary and Area Courts in Nigeria, [1978] J.A.L. 161-184 at p.162, n.3; for the volume of cases in Area Courts see Report of Area Courts Reform Committee, 39.
6. See the White Paper on the Federal Military Government's Views on the Report of the Customary Courts Reform Committee, op.cit. par. 2.

The Customary Courts Reform Committee recommended that there should be two grades of Customary Courts:

(a) Customary Courts (exercising original jurisdiction);
(b) Customary Courts of Appeal (exercising appellate jurisdiction).

The Government rejected the recommendation for Customary Courts of Appeal, and decided that Customary Courts, Grades I and II, both exercising original jurisdiction only, should be established.[1]

The new Constitution, however, provides that "There shall be for any State that requires it a Customary Court of Appeal for the State".[2] It provides for the appointment of Presidents and Judges for such courts.[3]

A Customary Court of Appeal shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.[3].

The Constitution also provides that there shall be for any State that requires it a Sharia Court of Appeal for that State.[4] The Sharia Court of Appeal of a State shall exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which includes inter alia:

"(a) any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;

(b) where all the parties to the proceedings are Moslems, any question of Islamic personal law regarding a marriage including the validity or dissolution of that marriage...."[5]

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1. Ibid. par. 4.
2. See Constitution of the Federal Republic of Nigeria (Enactment) Decree 1978, s.245(1).
3. Ibid., ss.246, and 247.
4. Ibid., s. 240.
5. Ibid., s. 242 2(a) and 2(b).

2. THE NIGERIAN FAMILY

A. Introduction.

There is no clear and consistent referent for the word "family". Used alone, the word is ambiguous, and has been applied indiscriminately to several social groups which, despite functional similarities, exhibit important points of difference. If the word "family", however, is to be used as a concept in scientific discussions, it must be given a precise meaning or meanings, and sociologists have found it necessary to develop a more precise terminology.

Murdock,[1] from his survey of 250 representative human societies, concludes that there are three distinctive types of family organization. The first and most basic is the nuclear family, which consists typically of a married man and woman with their offspring (if any),[2] although in individual cases, one or more additional persons may reside with them. The second type of family results from the combination of two or more nuclear families into a large aggregate. These composite forms of the family fall into two types, which differ in the principles by which the constituent nuclear families are affiliated. Thus, the polygamous family consists of two or more nuclear families affiliated through a common spouse, usually the husband. For example, under polygyny, one man plays the role of husband and father in several nuclear families and thereby unites them into a larger familial group.[3] An extended family, on the other hand, consists of two or more nuclear families affiliated through

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1. George P. Murdock, Social Structure, (London, Macmillan Co. Ltd, 1949, New York, The Free Press, 1965), 1-11.

2. See Radcliffe-Brown, Structure and Function in Primitive Society, 1971, op.cit., p.51, "a childless married couple does not constitute a family in this sense." This view is not generally supported.

3. The Polyandrous family consists of a wife her several husbands, and all their children. Radcliffe-Brown refers to such families as "compound families", and nuclear families as "elementary families", see Radcliffe-Brown, 1971, pp. 51-52.

consanguineal kinship bonds, such as those between parent and child or between the siblings. Thus the patrilocal extended family, often called the patriarchal family, embraces, typically, an older man, his wife or wives, his unmarried children, his married sons, and the wives and children of the latter. Extended families may be compounded from polygamous families, from monogamous nuclear families, or from both.

All three types of family described by Murdock exist, and, as far as the available literature indicates, have always existed in Nigeria from the earliest times.[1] The family is the most significant feature of African societies generally, and in Nigeria, the dominant social group is the extended family. In the traditional society, the extended family was the basis of the social and political system among the Igbos, Yorubas and other groups.[2]

B. The extended family.

The extended family of a living founder rarely comprises more than four generations,[3] and invariably consists of the head of the family, his brothers and their children and his sons and their children. It may also include adopted children, slaves,[4] and their offspring.

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1. See Meek, Law and Authority in a Nigerian Tribe, 1937, pp. 139-144. Meek, Northern Tribes of Nigeria, 1925, op.cit., p.226, Ward Price, Land Tenure in the Yoruba Provinces (Lagos: Government Printer, 1929), p.13.
2. See generally, Bradbury and Lloyd, The Benin Kingdom, op.cit., pp. 27-30; Forde, The Yoruba-Speaking Peoples of South Western Nigeria, 1969, pp.10-13; Daryll Forde et.al., Peoples of the Niger Benue Confluence (London, International African Institute, 1955, 1970 reprint), p.31, Fadipe, 1970, op.cit., pp.97-134; Bascom, 1969, op.cit.,pp.42-46; Meek, Law and Authority....", pp.88-164; Forde and Jones, 1967, pp.71-73; Forde, Efik Traders of Old Calabar,op.cit.,pp.120, 124; Meek, Northern Tribes, op.cit., Vol. 1, pp. 226-230.
3. See Bradbury and Lloyd, The Benin Kingdom, 1957, p.30; S.F. Nadel, A Black Byzantium: The Kingdom of Nupe in Nigeria, 1942 (1965 reprint) p.27.
4. See Alaka v. Alaka and Anor: [1904] N.L.R. 55.

Such a group is referred to by some writers as "minimal lineage"[1] to distinguish it from the larger extended family, the "maximal lineage or clan. Unlike the biological family, it does not include wives for, although wives are part of the nuclear family, or polygamous family where relevant, of their husbands, they are not members of his extended family.[2]

Children are regarded as belonging to the nuclear or polygamous family of their legal father, as well as to his extended family; hence, when the average Nigerian speaks of his "brother", he refers not only to the sons of his parents, but to all male members of his extended family group who could have been his brother in terms of age, but who, in fact, may be his sixth cousin removed.[3]

Married women remain members of their own extended families, and even during the subsistence of their marriage have rights and duties in their fathers' extended family in the patrilineal society. For example, when a member of a family dies, the umuada (daughters of the family) have certain funerary duties to perform, regardless of their marital state.[4]

In the towns, the nuclear or polygynous family usually occupies a single compound, and a group of such

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1. C.K. Meek - The Tribes of Northern Nigeria 1925, Vol.I, p.226; Bascom, The Yoruba of Southwestern Nigeria, op.cit., pp.42-46; Forde, The Yoruba-Speaking Peoples, op.cit., pp. 10-13; Meek, Law and Authority, op.cit., pp.1-4.
2. See Meek - The Tribes of Northern Nigeria, Vol.1, p.226; J.R. Wilson Haffenden, The Red Men of Nigeria: An Account of a Lengthy Residence among the Fulani, or Red Men and other Pagan Tribes of Central Nigeria...." (London: Seeley, Service and Co. Ltd. 1930), pp.274-275.
3. Meek, The Northern Tribes of Nigeria, Vol. 1, p.226; Wilson-Haffenden, 1930, op.cit., p. 276;
4. Women of the family usually wash the corpse and prepare it for burial among some Igbo communities. At the second burial of the deceased they perform a ceremony known as "itu-unu", which indicates the fact that the final ceremonies for the glorification of the deceased's spirit have been duly performed. The first daughter of each family has an important function in cases of burials, see generally, Basden, Among the Ibos of Nigeria, 1966, p.112-126, esp. at 122; Meek, Northern Tribes, op.cit., Vol.1, p. 126.

compounds, whose members constitute an extended family, is sometimes surrounded by a large wall. If the extended family occupying a compound becomes too large, some members may establish residence elsewhere.[1]

Among the Yorubas, the houses in the traditional society were generally built in a cluster for protection, and for convenience of social intercourse. Each family usually has a house to itself, but in some cases, the members of various branches of an extended family would decide to build one large compound for themselves within which every married woman would have a room for herself and her children, with verandahs for common use, and a few rooms set apart for the important men. On the other hand, it was not unusual for a man to build a separate detached house for himself, his wives and children, and include a space around it for the use of his descendants.[2]

Within the family compound, the senior male member (or in some communities, for example, Yoruba and Efik, a female member (if she is the most senior), is the head,[3] and he has certain obligations and rights. For example, it is his duty to allocate the family land, and to settle disputes among members of the family. Thus disputes among resident members and their wives are subject to his authority,[4] but the heads of the extended families of

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1. See Forde, The Yoruba-Speaking Peoples of South-Western Nigeria, op.cit., p.12; Fadipe, The Sociology of the Yoruba, op.cit., p.98; Bradbury and Lloyd, The Benin Kingdom, op.cit., pp.27-28.
2. See Ward Price, Land Tenure in the Yoruba Provinces, op.cit., par. 17, p. 6.
3. The head of a family is called bale among the Yorubas, okpala or diokpala among the Igbos; emitso, among the Nupe, - see Forde, Peoples of the Niger-Benue Confluence, op.cit., p.31.
4. The three types of family form a hierarchy, insofar as the head of the nuclear or polygynous family may be under the head of the extended family (minimal lineage), who may, in turn, be subjected to the head of the maximum lineage.

the wives may intervene on their behalf if necessary.[1]

In Balogun v. Balogun,[2] Graham, J., described the functions of the head of a family as follows:

> "The head of the family is in charge and control of the family property; he collects the revenue of family property; he has to make certain disbursement out of family revenue for family purposes, upkeep of the family property, funeral, marriage and baptism ceremonial expenses of members often involving the entertainment of strangers, litigations on behalf of the family, maintenance of indigent members of the family, education of children and so on".

The extended family, however, is composed of families which are independent of non-members as regards the management of their own affairs,[3] provided they act in accordance with the accepted norms of the society. In times of need, for example, sickness, death or other adversity, the extended family is a reservoir of material and moral aid.[4]

The wider family of a deceased founder may be composed of several sets of extended families (maximal lineages) and number thousands of people all tracing their descent to a common deceased ancestor. Thus a whole village

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1. For the obligations and duties of the head of an extended family see, Forde and Jones, 1967, p.15; Bradbury and Lloyd, The Benin Kingdom: And the Edo-Speaking Peoples of South-Western Nigeria, 1970, p. 29; Fadipe, The Sociology of the Yorubas, pp.105-114; Chinwuba Obi, Modern Family Law in Southern Nigeria, (London, Sweet and Maxwell, 1966) pp.27-32; C.K. Meek, Law and Authority pp.61-62; 104-114; G.T. Basden, Niger Ibos, pp.121 and 151; T.O. Elias, Nigerian Land Law, pp.103-114; Waddell, Twenty Nine years in the West Indies, op.cit., p.313; Ward Price, Land Tenure in the Yoruba Provinces, op.cit., par. 45, p. 14.
2. [1935]2 W.A.C.A. 290, 299; see also Ononye v. Obanye and Ors. [1945]11 W.A.C.A. 60 at p.62. In Fatai Adisa Anibire and Anor v. Howells and Anor; it was held that the concept of "head of family" in customary law need not be proved by evidence, but should be judicially noticed. Fatai Adisa Anibire and Ors. v. Howells and Anor. [1973]3 U.I.L.R. 36.
3. There are exceptions to this pattern, see Wilson-Haffenden, The Red Men of Nigeria, op.cit., p. 275.
4. The operation of the system was fully illustrated during the Nigerian Civil War, when many people from the Eastern States were forced to return pennyless, and often wounded, to their home-towns, where they were given succour by members of their extended families.

may claim descent from a common ancestor.[1] This wider group is variously referred to as patrilineal lineage, clan, tribe or sub-tribe.[2]

The solidarity and importance of the extended family has been somewhat weakened in modern Nigerian society, due to a variety of causes among which the following may be mentioned:

(i) The influence of Islam: Islamic law recognizes only the nuclear or polygynous family, consisting of a man, his wife or wives, his children, his slaves and their children. Generally, after the adoption of Islam, the traditional extended family is maintained, but in a modified form, while the nuclear and polygynous families receive greater recognition. The process of change begins with the disappearance of the ancestor cult. One of the main functions of the head of the extended family is the performance of rituals connected with deceased ancestors, and the major source of his authority derives from the supernatural. With the adoption of Islam the dead lose their influence over the lives of the living, and the unity of the old community is consequently breached.[3] The Yorubas are a notable exception in this respect.[4]

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1. The Oloto family of Lagos, and the Amobi family of Ogidi are two examples of such large extended families.

2. Compare e.g. Talbot, The Peoples of Southern Nigeria, Vol. IV, pp.39-41; Meek, Law and Authority...,pp.3-4; S.N. Chinwuba Obi, The Ibo Law of Property,(London, Butterworths, 1963),pp.4-23; Forde, The Yoruba-Speaking Peoples, op.cit., pp.10-13; Bascom, The Yoruba of South-western Nigeria, op.cit., p. 42-46.

3. See Spencer J. Trimmingham, Islam in West Africa, (London, Oxford University Press, 1959, 6th imp. 1976).pp.126-130.

4. The Yoruba family structure has successfully resisted the disintegrative influences of Islam and Christianity, and to a lesser extent modern urbanization and industrialization, see J.N.D. Anderson, Islamic Law in Africa, (London, Frank Cass and Co. 1955, new imp. 1970) pp. 222-224; Trimmingham, Islam in West Africa, p. 129. See Aldous, "Urbanization and Kinship" in Social Problems of Change and Conflict edit. by Pierre Van Den Berghe (California, Chandler Publishing Company, 1965) pp.424-425.

(ii) The adoption of Christianity: This has also been a frequent cause of the fragmentation of compounds, especially in the urban areas, and the abolition of traditional rituals also had an adverse effect on the family unity of Christians.

(iii) Modern economic conditions: Economic conditions in modern Nigeria make it possible for members of the family to live and work, or trade far away from their home towns or villages. This has led to the growth, and even perhaps ascendancy, of individualism, and the development of the biological family unit at the expense of the extended group.

(iv) The acquisitive nature of modern society is destructive of family unity. Each segment of the family, with a view to securing a position of predominance and the major part of the family wealth, tends to sacrifice the general welfare of the extended family as a group. This tendency is particularly acute in polygynous families, where children of the same father but different mothers have a rooted dislike and distrust of each other, and jealousy, fostered by their mothers, is rife.[1]

(v) One of the most important functions of the family head was to act as arbitrator or even judge in inter-family disputes, including disputes among members of the family and their spouses. Nowadays, the tendency is to take such disputes to a court of law, thus eroding the traditional importance of the family as a group.[2]

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1. See further, below, Chapter IV, pp.356-358.

2. The Population Census of Eastern Nigerian Report, 1953, p.56, states: "While most minor disputes are settled in family meetings, a very large number of cases go to Court, and a few years ago it was possible to calculate that on the average, every man, woman and child had been in court, either as principal or witness during the year. About one-fifth of these cases are about land and about three-fifths about marriage, bride-price or the custody of children".

(vi) Unlike the traditional society, where a man derived his position in the wider political and social community, and his rights and privileges accrue to him, only as a member of his extended family, in the modern cities, a person's political, social, or economic position may be unrelated to his extended family group. A man is capable of maintaining himself and his immediate family, by the sale of goods or his personal services without resort to the extended family.[1] This means that a communal pattern of behaviour has been largely replaced by an individualistic one.

Group consciousness, characteristic of Nigerians, is being replaced by the desire for independence, and the assertion of individual right and freedom, most evident among high school graduates immigrants in urban centers. Although familial attachments are still common in urban areas, yet these are found mostly among the illiterate migrants or seasonal workers. Many people living in Lagos have not visited their home towns in the Eastern States for ten or more years.[2]

C. The Polygamous family.

The traditional Nigerian family is polygynous or potentially polygynous. The customary law of all communities allows a man to marry as many wives as he can financially afford, and the number of wives a man had was usually

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1. Cf. Maine's statement that the movement of the progressive societies has been from status to contract, status taken to mean a legal condition imposed by law on the individual independently of his own choice and as a result of circumstances over which he had no control - to the state where the individual becomes more and more able to determine his legal rights and duties by his own free agreement, although some portions of status still remains. Such a movement gives rise to a gradual dissolution of family dependency and the growth of individual obligation in its place; Maine, Ancient Law, op.cit., p.170; See Graveson's criticism of the Statement, Graveson, Status in the Common Law, op.cit.,pp.33 et.al.

2. See Pius Okigbo, "Social Consequences of Economic Development in West Africa", op.cit., pp.420-425.

an indication of his social and economic prestige. Islamic law limits the number of legal wives to four.[1]

Polygamy will be dealt with more fully in a later chapter, but it should be noted here that the number of polygynous families shows a steady decline, especially in the Southern States, and in all parts of the country, the majority of families are in fact monogamous.[2]

D. The Nuclear Family.

Linton's view that the nuclear family plays "an insignificant role in the lives of many societies"[3] has been rejected by Murdock,[4] who found no support for it from his data collected from 250 representative human societies, or from any other reliable ethnographer. Murdock concludes that "Whatever larger familial forms may exist, and to whatever extent the greater unit may assume some of the burdens of the lesser, the nuclear family is always recognizable and always has its distinctive and vital functions - sexual, economic, reproductive and educational...."[5] The nuclear family is found in every society in Nigeria, and is the dominant economic group in most communities.[6] In many societies, it is used as a basis of succession and inheritance, or for the distribution of wealth.

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1. See further, below Chapter IX,28-37.
2. See below, Chapter IV,339-347.
3. Ralph Linton, The Study of Man, op.cit., pp.154-155.
4. Murdock, Social Structure, op.cit., pp.3.
5. Ibid., p.3.
6. See Bradbury, The Benin Kingdom, 1957, op.cit., p. 281.

3. MARRIAGE LAWS APPLICABLE IN NIGERIA

A. Introduction

In common with most African territories,[1] Nigeria has a tripartite system of laws. This complex legal system reflects the historical development of the country. Before the intrusion of Islam and British colonization, the various ethnic groups had their own autonomous systems of customary laws. Although there were local variations, the laws of macroethnic groups had similar basic principles, and since most groups were endogamous, little conflict in marriage laws was experienced.

With the advent of Islam, many areas penetrated by that religion adopted Islamic law in relation to marriage and family life to a greater or lesser extent.[2] This resulted in an amalgam of Islamic law principles, and the principles of the customary law of the converted tribes, in which one or the other predominated in different aspects of marriage.[3]

Finally, colonization introduced the English legal system as the fundamental and general law of the country, but permitted and recognized the application of the two previously existing laws, provided they were not repugnant to civilized ideas of justice and humanity.[4]

The types of marriages practised in Nigeria today correspond to these three systems of law. Thus, Nigerians may marry according to customary law, Islamic law, or under the Nigerian Marriage Act, which is based

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1. See e.g. Kenya, Ghana and Siera Leone. Some countries, for e.g. Uganda, have four systems of law. See generally Arthur Phillips, "Marriage Laws in Africa", in A Survey of African Marriage and Family Life, edit. by Arthur Phillips, (London, Oxford University Press, 1953), pp.173-327.
2. Islamic influence in the sphere of personal relations is mainly confined to Moslems in the Northern States. Although a significant proportion of Yorubas profess the Moslem religion, their marriage and family life are governed by Yoruba customary law. See Map 8 above, p.194.
3. See further below, Chapter IX, pp.11-14.
4. See further below, pp.182-189.

on English law. The principles of law applicable to each of these types of marriage differ considerably, and to a large extent in most cases they are administered by different systems of courts respectively.[1]

This pluralism of marriage laws, and dichotomy of courts, result in various kinds of internal conflicts of laws, compounded by the fact that a person may marry under more than one system at the same time, or may convert from one system to the other, under certain circumstances. To add to the confusion, the law regulating the relationship among the systems is far from clear, as will be seen in future chapters.

In Nigeria, Islamic law is generally classified as customary law.[2] The differences in origin, nature and fundamental principles between Islamic law and indigenous customary laws, especially in relation to marriage and the status of women, however, justify separate treatment. Accordingly, Islamic law will be treated as a separate system of law in much of this study.

These three systems of law will be briefly discussed, in order to give some insight into their general nature, the source of their authority and the limits of their application, with particular reference to the law of marriage and the status of women.

B. Customary law.

(1) Introduction

Customary law determines the legal status of the majority of married women in Nigeria.[3] With the

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1. See above, pp.157-159.
2. See S.2, High Court Law, Cap. 49, Laws of Northern Nigeria 1963 Revision, Item 23, Exclusive Legislative List, Federal Constitution of Nigeria, 1963; see further below, p.189.
3. See Table 2:1 and Fig. 3, pp.175 and 176 respectively.

exception of the Moslems in the Emirates of Northern Nigeria, whose marriages are regulated by Islamic law, the overwhelming majority of people marry according to customary law only. Out of a total of 379 married persons interviewed by the present writer in the Southern States of Nigeria, 226 (59.6 percent) were married according to customary law only. Only 24 persons who had contracted other types of marriages had not also contracted a customary law marriage with the same person. Although 17 of the Yoruba persons interviewed stated that their marriages were celebrated according to Islamic laws, southern Yorubas observe Yoruba customary law, rather than Islamic law, in marital and family matters.[1] These marriages, therefore, for all practical purposes, can be counted as customary law marriages. This would give a total of 355 out of 379 persons who contracted customary marriages, or 89.2 percent of all the married persons interviewed. (Table 2:1).[2]

In large cosmopolitan cities like Lagos, where people are far removed from their families, and the younger elements assert a greater degree of independence in marital affairs, there is evidence that the modern trend seems to be that persons do not usually celebrate a customary law marriage as well as a statutory marriage. For example, details of 412 marriages contracted at Lagos Marriage Registry from 11 January, 1975, to 31 July, 1975, were analysed by the present writer. The data from these marriages showed that only 54 of the couples were married to each other according to customary law, before their marriage under the Marriage Act. The others, except for seven husbands who were divorcees, three widowers, and two widows, all described themselves as "single" - not having gone through any form of marriage before.[3]

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1. See further below, Chapter IX, pp.20-23.
2. See Green, Igbo Village Affairs, op.cit., p.30; up to 1934, no-one in the village of Agbaja (Igbo) had contracted a Christian marriage.
3. See below, Table 2:1, p.175.

There is the possibility of these couples contracting a subsequent customary law marriage later, but further evidence from Onitsha makes this unlikely, at least in some cases.'

An analysis of 71 marital disputes brought to the Social Welfare Office in Onitsha, showed that 50 (71 percent) of the marriages were celebrated under customary law only. Of the 21 marriages which had been celebrated under the Marriage Act, sixteen couples were not married according to any form of customary law, although the marriages had lasted for a considerable number of years in many cases.

This evidence does not detract, however, from the accuracy of the assertion that the majority of Nigerian women marry under customary law only.

(II) Nature of customary law. There is no statutory definition of customary law. The nearest approach to a definition of customary law is contained in the Customary Courts Law,[1] 1956 of the former Eastern Region of Nigeria, as follows:

> ".... 'customary law' means a rule or body of rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question".

The Evidence Ordinance, 1948 defined "custom as a rule which, in a particular district, has from long usage obtained the force of law".[2]

There are also few judicial definitions of customary law. In Alfa v. Arepo,[3] Duffus, J., said:

> "Customary law may be defined as the unwritten law or rules which are recognized and applied by the community as governing its transactions and code of behaviour in any particular matter. This law is unwritten....it owes its authority to the fact that the custom has been established from ancient days.

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1. E.R. No. 21 of 1956, S.2.
2. Cap. 63, Laws of Nigeria, 1948 edition, S.2.
3. [1963] W.R.N.L.R., 95, at 97.

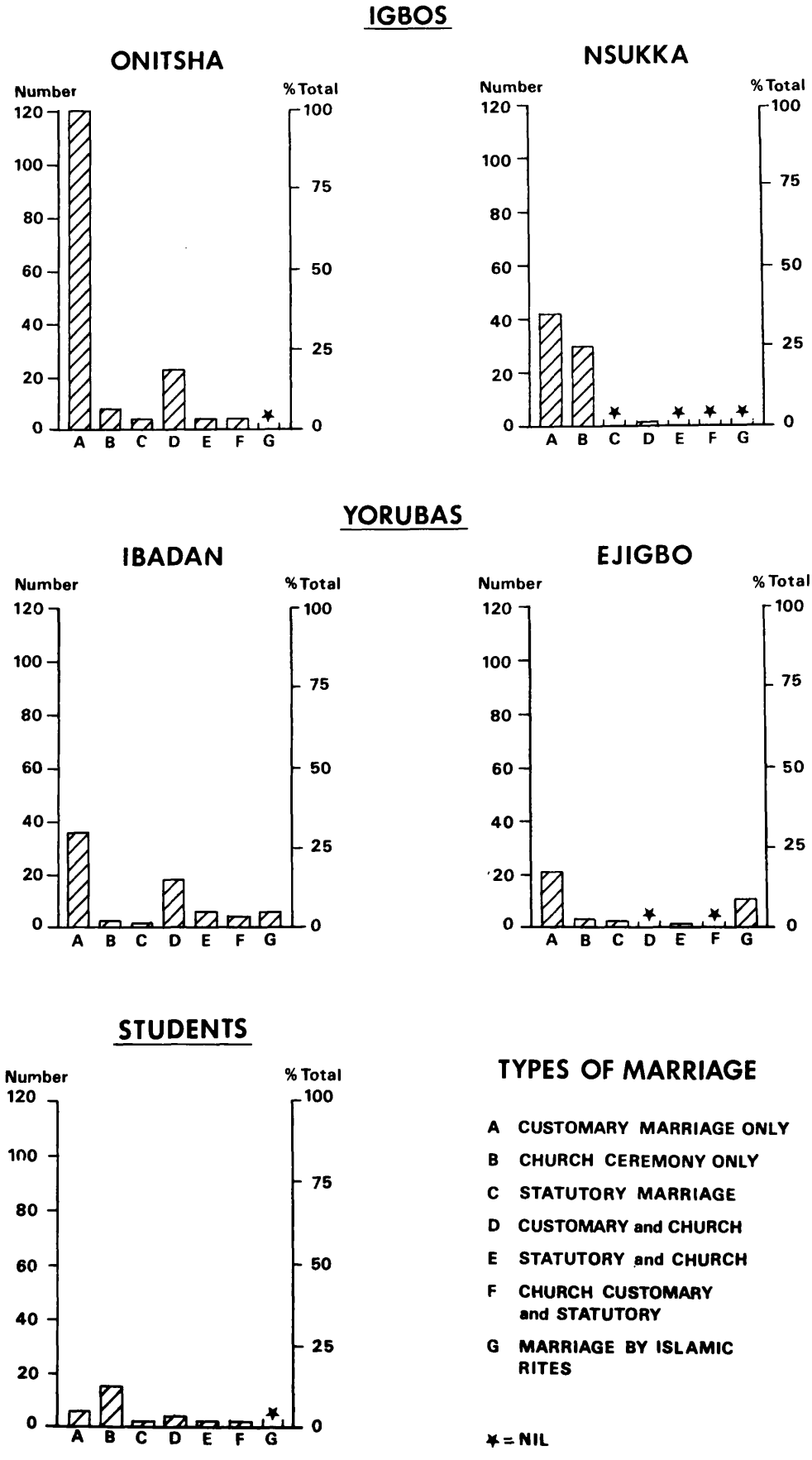
TABLE 2:1

TYPES OF MARRIAGES CONTRACTED BY FEMALE INTERVIEWEES

Types of Marriage	IGBO WOMEN				YORUBA WOMEN				STUDENTS			
	Onitsha		Nsukka		Ibadan		Ejigbo		Students		Total	
	No.	% of Total	No.	% of Total	No.	% of Total	No.	% of Total	No.	% of Total	No.	% of Total
Customary law only	120	73.2	43	60.6	36	47.4	21	55.2	6	20	226	59.5
Church only (a)	8	4.9	27	38	3	3.9	3	7.9	14	46.7	55	14.5
Statutory	4	2.4	Nil	-	2	2.6	2	5.3	2	6.7	10	2.7
Customary + Church	24	14.7	1	1.4	18	23.7	Nil	Nil	4	13.3	47	12.4
Statutory + Church	4	2.4	Nil	-	7	9.2	1	2.6	2	6.7	14	3.7
Church, Cust. and Statutory	4	2.4	Nil	-	4	5.3	Nil	-	2	6.7	10	2.7
Islamic only	Nil	Nil	Nil	-	6	7.9	11	29	Nil	-	17	4.4
Totals	164	10.0	71	100.	76	100.	38	100.	30	100.	379	100.

(a) Marriages celebrated in church only are not valid statutory marriages unless the formalities prescribed by the Marriage Act are observed; see further, Chapter XI.

FIGURE 3


IGBOS
ONITSHA
Number
% Total
120
100
80
60
40
20
0
100
75
50
25
0
A B C D E F G
NSUKKA
Number
% Total
120
100
80
60
40
20
0
100
75
50
25
0
A B C D E F G
YORUBAS
IBADAN
Number
% Total
120
100
80
60
40
20
0
100
75
50
25
0
A B C D E F G
EJIGBO
Number
% Total
120
100
80
60
40
20
0
100
75
50
25
0
A B C D E F G
STUDENTS
Number
% Total
120
100
80
60
40
20
0
100
75
50
25
0
A B C D E F G
TYPES OF MARRIAGE
A CUSTOMARY MARRIAGE ONLY
B CHURCH CEREMONY ONLY
C STATUTORY MARRIAGE
D CUSTOMARY and CHURCH
E STATUTORY and CHURCH
F CHURCH CUSTOMARY and STATUTORY
G MARRIAGE BY ISLAMIC RITES
* = NIL

> Customary law is not, however, a static law and, in my view, the law can and does change with the times and the rapid development of social and economic development".

This passage aptly summarizes the basic nature and characteristics of customary law: it is unwritten,[1] it must be a mirror of accepted usage[2] in the area where it is applied, and its rules change with time.[3]

Although customary law is unwritten, in some parts of Nigeria, the principles of customary law relating to matrimonial causes have been recorded.[4]

It is important that the customary law be recognized and adhered to by a particular community as binding. In other words, customary law is not uniform, but varies from tribe to tribe, and even within the same sub-tribe, divergent principles of law may apply.[5] Thus among the Igbos, the customary law of Onitsha may be different in details from that applied in Arochukwu, and both may differ radically from the laws applied by the

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1. See Cole v. Folami [1956]1 F.S.C.66 at 68; Rotobi v. Savage [1944] 17 N.L.R.77; but see Bakare v. Coker [1935]12 N.L.R. 31; and Babajide v. Bankole [1962] Unreported, Suit No. AB/8A/60, Ibadan Civil Appeal No. 1/59A/62, Ibadan High Court.

2. Per Bairamain, F.J., in Owonyin v. Omotosho [1961]1 All N.L.R. 304, at p. 309.

3. Osborne, C.J., in Lewis v. Bankole [1909]1 N.L.R. 81,101; see further below, p.

4. In the Northern States some Native Authorities have recorded the rules relating to customary marriage in their respective areas, see e.g. Native Authority (Declaration of Bui Native Marriage Law and Custom) Order, 1964, N.A.L.N. 9 of 1964; Native Authority (Declaration of Borgu Native Marriage Law and Custom) Order, 1961, N.A.L.N. 52 of 1961; Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order, 1959, N.A.L.N. 63 of 1959; Native Authority (Declaration of Tiv Native Marriage Law and Custom) Order, 1955, N.R.L.N. 149 of 1955. See also the Marriage, Divorce, and Custody of Children Adoptive Bye-Law Order, 1958, W.R.L.N. 456 of 1958, of the former Western Region of Nigeria; and The Ikwerre-Etche Federated Native Authority (Ikwerre Clan Area) (Marriage) Rules, 1953, E.R.L.N. No. 53 of 1954, of the former Eastern Region of Nigeria.

5. See Edokpolor v. Idehen [1961] W.R.N.L.R. 11.

Tivs. This aspect of customary law is abundantly illustrated in future chapters, but often it is forgotten by judges, especially in relation to marriage.

In Awgu v. Nezianya,[1] Gold Coast authorities were cited to prove customary law, although the case originated from Onitsha in Nigeria. Verity, C.J., observed that, although in the specific instances cited, the principles of native law and custom were expressly applicable to the Gold Coast, "they were nevertheless equally applicable as general principles to the law and custom of Nigeria, a departure from which can only be justified if it is established by evidence that the native law and custom in any particular area differs from the general principle". This dictum established a dangerous doctrine, since no single system of customary law is applicable throughout West Africa, nor are there even general principles of universal validity. It is unsatisfactory to rely on authorities drawn from a different country, and dealing with a different system of law, for the ascertainment of the rules of a given system. Litigants should not have to disprove the application to them of principles drawn from some system of law other than, and possibly far removed from, their own.[2]

The most important characteristic of customary law is its flexibility and changing nature. The flexibility and non-static nature of customary law have been stressed in a number of cases. In one of the earliest cases,

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1. [1949]12 W.A.C.A. 450; see also T.O. Elias, Law and Social Change in Nigeria, (London: Evans Bros. Ltd. (1972), p.267.

2. See Okpowagha and Anor. v.Ewhedoma [1970]1 All N.L.R. 203; the Supreme Court held: where there is no direct evidence of a custom or where such evidence as exists is a judicial decision not referrable to the particular area concerned, the Supreme Court would refuse to accord recognition or give effect to or enforce such custom or clothe it with the force of law; see also Adegboyega and Ors v. Igbinosun and Ors.[1969]1 All N.L.R.1; Taiwo v. Dosunmu and Anor. [1966] N.M.L.R.94.

Lewis v. Bankole,[1] Osborne, C.J., noted that

> "One of the most striking features of West African native custom...is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character".

In the same case, at first instance, Speed, Ag. C.J., affirmed that the native law and custom which the courts enforce must be "existing native law and custom, and not that of bygone days".[2] Similarly, in Balogun and Ors. v. Ashodi,[3] Webber, J., said the courts were "to administer existing native law", and that the "chief characteristic feature of native law is its flexibility". The Supreme Court in Apoesho v. Awodiya,[4] noted that "it is a well-known fact that in recent years customs have changed rapidly in Nigeria, and what was the custom twenty years ago has ceased to be the custom of the people".

The changing nature of customary law is not peculiar to Nigeria, or Africa, as will be seen throughout this thesis, and this fact was observed in Wokoko v. Molyko,[5] where it was stated that

> "....in the past native custom has been by no means static: indeed a great many native customs in West Africa are manifestly of European origin, and it is eminently desirable that native custom should be progressive, as in this case, where the older, and as I hold superseded custom would restrain development".

This statement highlights one of the central themes of this work: the similarity of many aspects of Nigerian customary laws of marriage and family life and the traditional customary family laws of Europe and other

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1. [1909]1 N.L.R. 82, pp. 100-101.
2. Lewis v. Bankole [1908]1 N.L.R. 81 at p. 83.
3. [1931] 10 N.L.R. 36.
4. [1964]1 All N.L.R. 48 at p.53.
5. [1938] 14 N.L.R.

societies - laws now discarded by those societies in accordance with changed social and economic circumstances.

In spite of the judicial recognition of the changing nature of customary law, as evidenced by the cases cited above and others,[1] many courts persist in applying archaic rules of customary law which adversely affect the legal status of women regardless of the fact that the customary law as practised by the community has changed. This is in large part due to the difficulty of proving that the law has changed.

(III) Proof of customary law. In Nigeria, judges of Customary Courts are presumed to know the customary law of the area, and litigants are not required to prove the law.[2] In the non-customary courts, however, the onus is on litigants to establish what a custom is, the existence of such a custom, and to show that persons, or a class of persons, concerned in the particular area regard the custom as binding upon them. Thus, the existence or non-existence of a custom in relation to any particular matter or transaction under any given area of the country, is a question of fact which must be proved by evidence.[3] The necessity for such evidence only ceases when, in the words of Lord Justice Channel in the case of Angu v. Attah,[4] quoted with approval in Larinde v. Afiko,[5] "the particular customs have, by frequent proof in the courts become so notorious that the courts take judicial notice of them."[6]

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1. See e.g. Eshilgbayi Eleko v. Officer Administering the Government of Nigeria [1928] A.C. 459; [1931] A.C. 662 at 673.
2. See Egri v. Uperi [1973] 4 E.C.S.L.R., 632.
3. S.14(3) Evidence Act, Cap.62, Laws of Nigeria, 1958 Revision. See also Ibid., s.s.56(1) and 58.
4. [1921](Gold Coast Reports P.C. 1874 to 1928); see also Larinde v. Afiko [1940] 6 W.A.C.A., 108.
5. [1940] 6 W.A.C.A. 108; see also Adagun v. Fagbola & Anor. [1932] 11 N.L.R. 110; Buraimo v. Gbamboye [1940] 15 N.L.R. 138; Eccua Bimba v. Effuah Mansa, see Sarbah, Fanti Customary Laws, 3rd edit. (London, Frank Cass and Co. Ltd. 1968), p. 137.
6. S.14(2) Evidence Act, Cap.62, Laws of Nigeria, 1958 Revision; Odunsi v. Ojora and Ors.[1961] 1, All N.L.R.283.

Customary law is difficult to prove, but change in customary law is almost impossible to prove in some cases.

In Balogun and Anor. v. Ashodi,[1] the question arose as to whether land could be the subject of a sale under Yoruba customary law. Kingdom,C.J., in a dissenting judgment, said he was aware that "native law and custom is a live thing, and may change as conditions change", but he wanted "strong evidence" that the change had in fact taken place. He said:

> "I cannot think that, because a number of people - even a large number - choose, for their own pecuniary advantage to treat the law as though it were different from what it is, their actions can have the effect of changing the law".[2]

Yet in 1931, when this case was decided, sale and other alienations of land were notorious, not only among the Yorubas but also in other parts of the country, where land traditionally had never been sold.[3] As early as 1902, the administrator of Southern Nigeria reported that many new houses were being built on leased land in Ibadan. He wrote:

> "I have repeatedly warned the Bashorun and Council of the grave and serious trouble they are creating for themselves in leasing land to Europeans and strangers in this highly irregular fashion".[4]

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1. [1931] 10 N.L.R. 36.
2. Balogun and Anor. v. Ashodi [1931] 10 N.L.R. 36 at p.57.
3. See C.K. Meek, Land Law and Custom in the Colonies, (London: Frank Cass and Co. Ltd., 1968), pp.150 and 300; M.M. Green, Land Tenure in an Ibo Village, (London: Lund and Humphries, 1941), p.34; J.O. Field, "Sales of land in an Ibo Community", Man, Vol.XLV, No. 47, 1945; Elias, Nigerian Land Law,1971, pp.148-149; see also Attorney General of Southern Nigeria v. John Holt and Co. [1910] 2 N.L.R. 1 at 3; Lewis v. Bankole [1909] 1 N.L.R. 82 at 83.
4. Great Britain, Public Record Office, C.O. 684, Dispatch No. 33 par. 3, 15 Feb. 1902. See also C.O. 580, Dispatch No. 140 of 21 May, 190.

Similarly, in 1908, it was stated that "at the present time a native occupier in Lagos may mortgage his interests in land...."[1]

No proof of customary law is required in customary courts,[2] but customary court judges are usually very traditional, and would refuse to recognize any change in customary law, especially in relation to marriage, unless they were forced to do so by a statutory provision. Some aspects of customary law of marriage have been enacted in legislative provisions, but the bulk of customary law remains unwritten, and this tends to make the law vague.

(IV) The validity of customary law. In Nigeria, rules of customary law are subject to certain general tests of validity before they can be enforced. Wherever customary law is stated to be enforceable in a statute, it is always qualified. Thus, the High Court Law of the former Western Region provides:

> "The High Court shall observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any written law for the time being in force, and nothing in this Law shall deprive any person of the benefit of any such customary law".[3]

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1. Great Britain, Public Record Office, C.O. 879, No. 906 (African (West)) Memorandum on Land Tenure and Land Revenue Assessment in Northern Nigeria; Sir Percy Girouard, Colonial Office, May 1908, Appendix III, Land Tenure in the Central and Eastern Provinces of Southern Nigeria, 9 Jan. 1908, by M.R. Menendez.

2. Egri v. Uperi [1973]4 E.C.S.L.R. 632 (Supreme Court decision); Ababio II v. Nsemfoo [1947]12 W.A.C.A. 127; Edokpolor v. Idehen [1961] W.N.L.R.11; see also Order 10, Rule 6, par. 3, Customary Courts Rules, 1966, Bendel State: "Where in any cause or matter before a customary court any party wishes to rely on the customary law of the area of jurisdiction of the court, there shall be no need to prove the customary law before the Court". Contrast Ehigie v. Ehigie [1961] All N.L.R. 842; customary law must be proved before a Grade A Customary Court in the Western States; Fijabi v. Odumola [1955-56] W.R.N.L.R. 133.

3. S.12 High Court Law, Cap. 44, West Region, 1958 Revision.

A similar provision is contained in the High Court Law of each State,[1] in the Evidence Act,[2] and in the various Customary Court Laws.[3]

The object of the incompatibility provision is to provide for inconsistencies between the provisions of customary law and statutory law. For example, under the Marriage Act, marriage is monogamous, and a man is legally entitled to have only one wife. Under customary law he is entitled to multiple wives. A statutory marriage deprives a man of his customary law right to contract polygynous marriages, since this right is inconsistent with the provisions of the Marriage Act.

The first limitation acts as a means of reforming customary law, and bringing it in line with modern ideas and practice. This is clearly illustrated by the Ghanian case of Addae v. Asante.[4] According to Fanti customary law as stated by Sarbah at the turn of the present century, if a father failed to obtain a wife for his son on reaching the age of puberty, he was liable for damages arising from the son's misconduct with any woman. The relevance of this custom to present day Ghana was questioned by Edusei, J., who found such a claim untenable. The learned Judge said:

> "Even if such a custom prevailed in the days of Sarbah, it is undoubtedly true to say that it cannot be the custom now for it is against good conscience to permit it to persist to the present times when present day children are asserting their freedom of action and thought in diverse ways. If the son is old enough to know what is sex, and in these days there is nothing esoteric about sex, I cannot see by what stretch of legal ingenuity a parent should be

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1. See S.22 High Court Law, Cap.61, Eastern Region, 1963 Revision; S.34, High Court Law, Cap.49 Northern Region, 1963 Revision; S.26, High Court Law, Cap. 52 Lagos State, 1973 Edition.
2. S.14(3) Evidence Act, Cap. 62 Laws of Nigeria, 1958 Revision.
3. See e.g. S.22 Customary Court Edict, 1966, Mid-Western State, No. 30 of 1966.
4. [1974]2 G.L.R. 288 at 291.

saddled with the son's responsibility".[1]

No general principle for the interpretation and application of the phrase has ever been propounded, and judges mainly use their own criteria of what is repugnant to equity, justice and good conscience. This results in an inconsistent application of the phrase, and conflicting decisions are not unknown. For example, in Laromeke v. Nekegho and Ayo,[2] the plaintiff obtained orders in the lower courts, requiring the second defendant, who was the widow of his late brother, to pay him £12, being a return of her dowry, and to deliver to him her two children by his deceased brother. From these orders the defendants appealed. The first defendant was the second defendant's father. The plaintiff was a Nigerian from Urhobo living in Accra. He led evidence that, by a binding Urhobo custom, the family of a deceased man select a member of the family to marry the deceased's widow. This custom was admitted by the defendants. By the custom, the widow is entitled to refuse the "levirate marriage", but in this event, the family is entitled to demand a repayment of the marriage dowry, and the custody of the children of the marriage.

The plaintiff claimed that he had been selected by the family to marry the second defendant, but that she had refused him. He was therefore entitled to the return of the dowry paid for her by his brother, and to the custody of the children. Sampson, J., in the Ghana High Court, held that such a custom, which requires a woman to deliver her children to a man she declines to marry, must be regarded as repugnant to natural justice, equity and good conscience within the meaning of the Courts' Ordinance, section 87 (1).[3]

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1. Addae v. Asante [1974]2 G.L.R. 288, at p. 291
2. [1958]3 W.A.L.R. 306.
3. Courts Ordinance of Ghana, C.4.

But in re The Estate of Agboruja,[1] on similar facts, and also in relation to the customary law of Urhobo, Ames, J., did not see anything wrong with a woman being forced to hand over her children in such a situation. He held that "there can be nothing intrinsically unfair or inequitable even in the inheritance of widows, where those who follow the custom are pagans, and not Mohammedans or Christians".[2]

As will be later seen,[3] this so-called "widow inheritance", and its concomitant - the deprivation of the widow of any benefit in the property left by her deceased husband if she refuses to be "inherited" - today remains one of the greatest injustices perpetrated in the name of customary law on Nigerian women. It is difficult to justify application of the rule on the grounds of religion, as the learned Judge did in the above case.

The phrase has been used, however, in a number of cases, especially by the earlier judges, to soften the harsh and discriminatory attitude of customary law towards women. Thus, in Solomon v. Gbobo,[4] Holden, C.J., held that a custom whereby the husband could divorce his wife at will, but the wife could not obtain a divorce unless the husband consented, was contrary to natural justice, equity and good conscience. Similarly, in Mariyama v. Sadiku Ejo,[5] the High Court refused to enforce the application of a rule of Igbirra customary law under which a wife is forbidden to marry within ten months of a divorce. If she does so in defiance of the rule, any child born as a result belongs to the former husband. In

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1. [1949] 19 N.L.R. 38.
2. Ibid, p.39.
3. See Chapter XIII below, pp. 438-442.
4. [1974]4 E.C.S.L.R.
5. [1961] N.R.N.L.R. 81

this case, the parties had been separated for several months before the divorce was granted. The wife remarried after the divorce, but delivered a child within ten months of the divorce. Her former husband was given custody of the child in the trial court, but the decision was reversed in the High Court on the ground that the rule was repugnant. The learned Judge was careful to point out that

> "We must not be understood to condemn this native law and custom in its general application...There is a similar provision in Moslem law and also in English law, where there is a presumption in similar cases that the former husband is the father. That presumption must be rebuttable if natural justice is to be done. In this case it has been clearly and absolutely rebutted."[1]

One of the oldest cases in which the repugnancy clause was applied in favour of women is Edet v. Essien.[2]

According to Ibibio customary law (as is the case in most systems of customary law) a man who has paid dowry for a woman is entitled to custody and legal paternity of all her children whether begotten by him or not, provided such dowry has not been repaid.

In Edet v. Essien,[2] a man paid dowry for a woman when she was a child. Later she married another man who had also paid dowry for her, and bore three children by him, one of whom died. The first husband, whose dowry had not been refunded, was granted custody of her two surviving children by the Customary Court in accordance with Ibibio customary law. On appeal, this decision was reversed on the ground that it was repugnant to natural justice, equity and good conscience that a man should be entitled to the child of another, simply because the dowry he had paid on its mother had not been refunded to him.

This decision alleviated the mental agony of many mothers who would have been deprived of their children

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1. Ibid., p.83.
2. [1932] 11 N.L.R. 47.

in similar circumstances. The decision seeped through to the Customary Courts, where judges, although reluctantly, applied the precedent to similar cases. Unfortunately, however, many High Court Judges have distinguished the decision on its facts, and have refused to follow it even in cases which would have justified the application of the repugnancy rule, independent of the decision in Edet v. Essien.[1]

An example of such a case is Nwaribe v. Registrar, Eastern Orlu.[2] In this case, the husband of a woman, O, died, and she continued to live in the matrimonial home with the family of the deceased. She became pregnant, but before delivery she married the father of the child, the applicant in the case. The native court, dealing with the formal dissolution of her marriage with the deceased, awarded the child to the deceased. The Applicant appealed, arguing that the decision of the Native Court was wrong, on the ground that it was against natural justice, equity and good conscience to have awarded the child to the deceased as against the new husband. Evidence given by the applicant himself indicated that

> "Under the local custom of Otulu, a woman whose husband is dead, cannot be married by any of the relatives of the deceased but the children born after the death of the deceased are the children of the deceased".[3]

Egbuna, J., held that if the applicant knew that this is the custom of Otulu, and impregnated the woman whilst she was staying in the deceased husband's place, he could not be heard to complain that the decision of the native court was against natural justice. The Judge quoted with approval a passage from Elias's book, "The Nigerian Legal System, to the effect that-

> "Under ancient customary law marriage was almost always indissoluble, as it was looked upon as a permanent social and spiritual bond between man

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1. [1932]11 N.L.R. 47.
2. [1964]8 E.N.L.R. 24.
3. Ibid., p. 26.

and wife on the one hand and their respective families on the other".[1]

The learned Judge held that if a woman stays in the matrimonial family after the death of her husband, and becomes pregnant during such period, it is not against natural justice and equity that the child is regarded as a member of that household.

With the greatest respect, it is submitted that the learned Judge failed to recognize the fact that, whether the widow remained in the deceased husband's family or not, according to Otulu customary law, any child conceived by her belonged to her dead husband. Secondly, the passage he quoted with approval referred to ancient customary law. Divorce is now prevalent in all Nigerian societies, and in all types of marriages, even inter vivos. Thirdly, the passage quoted referred to societies where the widow is allowed to remarry another member of her deceased husband's family. In the present case, the law expressly forbade such remarriage. Fourthly, but not the least important, the applicant was not protesting against the decision of the customary court as such, but against the particular rule of customary law which made such a decision legally possible. His knowledge of the law is therefore irrelevant.

As stated elsewhere,[2] the phrase "repugnant to natural justice, equity and good conscience" applies to "customary law", and not to its application in specific situations. It is therefore clear that the courts should in all cases consider whether the rule itself is repugnant to natural justice, equity and good conscience, and if they find that it is, then the particular rule should not be enforced, regardless of whether the complainant against the rule knew of its existence or not.

In a country like Nigeria, where men continue to marry women very much younger than themselves, widows may

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1. Ibid., p. 26.
2. A.E.W. Park, The Sources of Nigerian Law, (Lagos, African Universities Press, 1963, 4th imp. 1976, p. 78.

be very young. Any rule of law which denies remarriage to such widows, or indeed to any widow, must be regarded as repugnant and against public policy. It promotes illicit intercourse. It is also clear discrimination against women, since a husband can marry another woman during the life-time of the wife, but she is prevented from remarrying even after her husband's death. This principle of law is invalidated by section 39(1) of The Federal Constitution 1978.[1]

C. Islamic Law.

As previously stated Islamic law is generally classified as customary law in Nigeria.[2] However, the source, nature and legal basis of Islamic law are radically different from those of indigenous customary law.[3] Islamic law also differs considerably from customary law in relation to its treatment of women.

Islam is not indigenous to Nigeria. It is an imported religion in the same sense as Christianity is, but it predated Christianity in Nigeria by several centuries.[4] and since Islamic law has its basis in the

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1. See above pp. 148-149.
2. See above p. 172, n.2.
3. The Area Courts Reform Committee, in its Report, argues against "the lumping of Islamic law along with Customary law". The Report maintains that "Islamic law is a fully fleged jurisprudence which grew up and developed throughout the early period of Islamic History and in many parts of the world. It can indeed be fairly said that Roman law and Islamic law are the two great legal systems of modern times.... It therefore does not do justice to the system to disdainfully bracket it with an assortment of customary usages". See Report: Area Courts Reform Committee, p.29, S.53; Contrast Item 23, Exclusive Legislative List, Federal Constitution 1963 and Item 58, Exclusive Legislative List Constitution of the Federal Republic of Nigeria (Enactment) Decree 1978.
4. Islam antedated Christianity in Nigeria by over 400 yeears. The first Christian missionaries landed in Nigeria around the 1840's. The Portuguese made some mild attempts to convert certain groups in the early 15th century, but their interest was centered on trade and commerce in the Delta Regions of the East and Western parts of Nigeria

Footnote 4 continued.....

traditional customary laws of the ancient Arabs, many of its rules are similar to the rules of Nigeria's indigenous customary laws. Less friction is therefore experienced between customary and Islamic law, than between English law and either of them.[1] For example, both customary and Islamic law recognize polygyny while English law does not.

Schacht[2] notes that Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself, while Gibb[3] asserts that it is the Sharia which, down the centuries, has been the most effective agent in moulding the social order and community life of Muslim peoples and of holding the social fabric of Islam compact and secure through all the fluctuations of political fortune.

The sources of Moslem law are varied.

(1) The Koran: This contains the direct injunctions of God. The moral principles enunciated in the Koran, as well as the legal rules therein, were gradually built up during the life time of the Prophet Muhammad. They were not enunciated simultaneously as a complete code of laws, but in accordance with the exigencies of the moment and the requirements of each special case. Family law is fairly exhaustively treated in the Koran, albeit in a number of scattered passages. Emphasis is laid on conduct

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Foot 4 continued - rather than in the Gospel - see Babs A. Fafunwa - "Islamic Concept of Education with Particular Reference to Modern Nigeria" Nigerian Journal of Islam, Vol.1, No. 1, June, 1970 p. ; Hodgkin, Nigerian Perspectives, op.cit., pp.124-128; Ling Roth, Great Benin: Its Customs, Art and Horrors, 1903, p.6; J.J. Bowen, Adventures and Missionary Labours in Several Countries in the Interior of Africa, 1849-1856, 1857 (2nd edition 1968) pp.21-22; Burns, 1969, p.265;

1. Burns, History of Nigeria, 1969, p. 265.
2. Joseph Schacht, An Introduction to Islamic Law, (London: Oxford University Press, 1964), p. 1.
3. Hamilton Gibb, Mohammedanism, 2nd edit. (London, 1953), p.9.

towards women and children, orphans and relatives, but the legal effects of an act contrary to the rules are not mentioned.[1]

(II) The Sunna: These are the oral precepts delivered from time to time by the Prophet, and by reference to the daily mode of his life as handed down to posterity by his immediate followers. The Sunna supplements the Koran on many points on which the latter is silent.[2]

(III) Ijma is defined as agreement of the jurists among the followers of Muhammad in a particular age on a question of law. Its authority as a source of law is founded on certain Koranic and traditional texts. Ijma is an essential principle of Sunni jurisprudence.[3]

(IV) Kiyas or analogical deduction from the Koran and Sunna.[4]

(V) Customs and Usages.[5] The customs and usages of the people of Arabia which were not expressly repealed during the life-time of the Prophet, are held to have been sanctioned by the Law-giver by his silence. These customs are generally spoken of as having the force of Ijma, and their validity is based on the same texts as the validity of the latter. The Sunni Schools hold that custom overrides analogical law. It must not, however, be opposed to a clear text of the Koran or of an authentic tradition. The first four sources are formal sources, while the latter is a material source. The spirit of the law in Islam is religious and ethical, drawing its inspiration from the Koran and the teaching of the Prophet.

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1. See Abdur, Rahim, Muhammadan Jurisprudence, op.cit., p. 17; Tyabji, Muhammadan Law, op.cit., p. 6.
2. Rahim, Muhammadan Jurisprudence, op.cit., p.17, 69-71; Tyabji, op.cit., pp. 7, 10-14.
3. Rahim, op.cit., p. 18, 71-77, 115-136; Tyabji, op.cit. pp. 14-16.
4. Rahim, op.cit., pp. 137-160; Tyabji, op.cit., p. 16-18.
5. Rahim, op.cit., pp. 136-137; Tyabji, op.cit., p. 18-19.

> But the context of the law is based upon pre-Islamic customs and usages.[1]

There are four schools of law in orthodox Islam: the Maliki, Shafei'i, Hanafi and Hanbali. In Nigeria, the prevailing school is the Maliki. The tenets of the Maliki school also predominate in the rest of West Africa and in North Africa, especially Morocco and Algeria. The four schools mentioned above are known as the Sunnis. Their doctrines are essentially the same as regards the fundamental dogmas (usûl), though they differ from each other in the application of private judgment, and in the interpretation and exposition of the Koran.[2]

The majority of the population in the Northern States of Nigeria are Moslems and marry according to Islamic law.[3] In Faremilekun and Ors.v. The State, the Western State Court of Appeal stated that some Moslems marry according to customary law, and some marry under the Marriage Act.[4] As will be later seen, there are some aspects of customary law in the marriage rites of most Moslem communities in the Northern States. There are few Moslems, however, who marry solely according to customary law, and very few in the Emirates of Northern Nigeria marry under the Marriage Act. Of the 106 married Moslems interviewed in Maiduguri by the present writer, all were married according to Islamic law only.

Among the Yorubas of Southern Nigeria, a large proportion of the population are Moslems, but, apart from the presence of a mallam to recite verses from the Holy

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1. For the sources of Islamic law generally see Abdur Ramin, The Principle of Muhammedan Jurisprudence, op.cit., pp.16-36, 69, et.al; Tyabji, Muhammadan Law, op.cit., pp.6-24; Joseph Schacht, An Introduction to Islamic Law, (London: Clarendon Press, 1964), pp. 10-88; Origins of Muhammadan Jurisprudence, 1950.
2. Rahim, op.cit., p. 23; Tyabji, op.cit., p. 9.
3. In 1963, 71.7 percent of the population of the Northern Provinces were Moslems and in 1953, 73 percent professed the Moslem religion - see The Population Census of Nigeria 1963, North, Vol. 2, pp. 215-217; Population Census of Nigeria 1952-53 Summary Tables p.9.
4. See Faremilekun and 4 Ors. v. The State [1974]3W.S.C.A. 86.

Koran, the form of their marriage ceremony, the legal essentials, and the legal incidents of the marriage are all governed by Yoruba customary law.[1] A few Yorubas also marry under the Nigerian Marriage Act, among whom some are Moslems.

TABLE 2:2

POPULATION BY RELIGION AND SEX
FEDERAL REPUBLIC OF NIGERIA

	TOTAL		MALES		FEMALES	
Religion	Population	%	Population	%	Population	%
Moslems	26,276,496	47.2	13,397,054	47.7	12,879,442	46.7
Christians	19,207,144	34.5	10,077,436	35.8	9,129,708	33.1
Others	10,186,415	18.3	4,637,362	16.5	5,549,053	20.2
Total	55,670,055	100.0	28,111,852	100.0	27,558,203	100.0

Source: Population Census of Nigeria, 1963, Vol.III, op.cit., p.3.

D. General law.

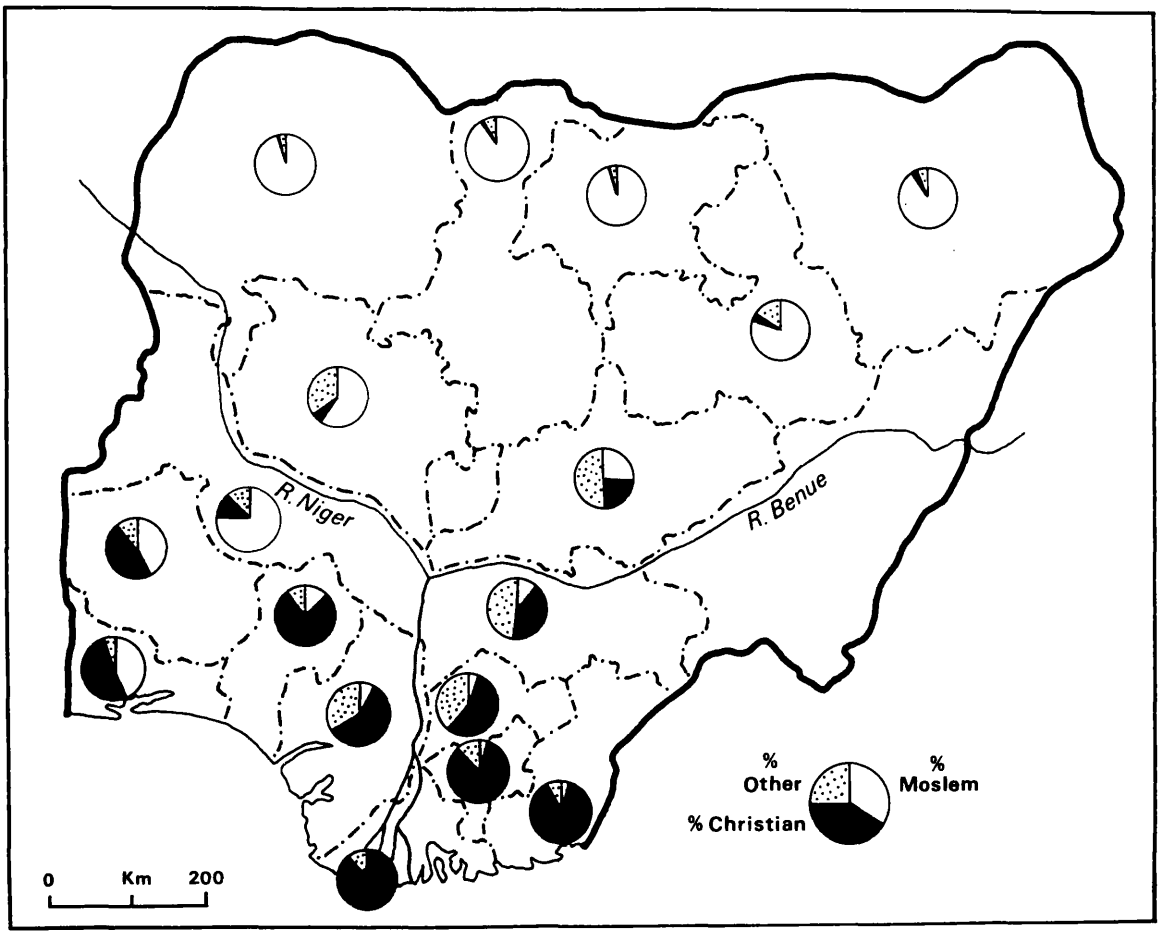
The term "general law" is used here compendiously to refer to that part of Nigerian law which was imported from England in one form or the other, as well as local statutes enacted by Nigerian Legislatures, much of which is based on English or other foreign laws.

The introduction of English law into Nigeria was effected by local statute law. Some of these local

1. See further, Chapter IX, pp.20-23.

MAP 8

STATES 1963 - POPULATION BY RELIGION



enactments provided for the reception of English law generally. For example, the High Court Law of Northern Nigeria, states:

> "28. Subject to the provisions of any written law and in particular of this section....-
>
> (a) the common law.
>
> (b) the doctrines of equity.
>
> (c) the statutes of general application which were in force in England on the 1st day of January, 1900, shall, insofar as they relate to any matter with respect to which the legislature of the Region is for the time being competent to make laws, be in force within the jurisdiction of the court".[1]

Statutes received in this manner, and of particular relevance to this study are:

(i) Intestates Estate Act 1890.[2]
(ii) Married Women's Property Acts 1882-1890.[3]
(iii) Will's Act, 1837.[4]

It is pertinent to note that a statute of general application which was in force in England in 1900, may still be in force in Nigeria, although the law may have been subsequently amended or even repealed in England.

In Oyo, Ogun, Ondo and Bendel States (all formerly parts of the former Western Region), common law and equity alone are received. In 1958 and 1959, the then Western Region Legislature enacted all the English statutes which it considered necessary to have as a part of Western

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1. Cap 49, Laws of Northern Nigeria, 1963 Revision.
2. 13 Stats.32; Johnson v. United Africa Company [1936]13 N.L.R. 13; Coker v. Coker [1972]6 C.C.H.C.J. 1.
3. 17 Stats. 116, see Ogedegbe v. Ogedegbe [1964] L.L.R. 209; Egunjobi v. Egunjobi [1974]4 E.C.S.L.R. 552; Asomugha v. Asomugha [1972]12 C.C.H.C.J. 91.
4. 39 Stats. 856; Thomas v. De Souza [1929] 9. N.L.R. 81; Yunusa v. Adesubokan [1968] N.N.L.R. 97; see further Chapter XIII.

Nigerian law. Some of the laws, for example the Married Women's Property Act,[1] were updated in conformity with subsequent changes in English law, but most pre-1900 statutes of general application were enacted in identical terms.

In addition to the general reception statutes, a few local provisions introduced English law upon a particular subject. An example which is particularly relevant here, was the States Courts (Federal Jurisdiction) Act,[2] section 4 of which imported into Nigeria the English Matrimonial Causes Acts, which dealt with divorce, nullity and other matrimonial causes.

Section 4 of the States (Federal Jurisdiction) Act was repealed by the Matrimonial Causes Decree, 1970,[3] which also provides that all "matrimonial causes" must now be instituted under the Decree.

Local statutes based on English law were also enacted. The Marriage Ordinance 1884, re-inacted in 1914 and still in force as the Marriage Act is particularly relevant. This Ordinance introduced the monogamous type of marriage into Nigeria. A monogamous marriage has been defined in Hyde v. Hyde[4] as the voluntary union for life of one man and one woman to the exclusion of all others.

Both customary and Islamic law marriages are potentially polygamous. This and other differences between customary and Islamic law marriages on the one hand and statutory or English type of marriage on the other have been fertile sources of conflict of laws which are fully discussed in later chapters.

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1. 17 Stats. 116.
2. Cap. 177, Laws of the Federation of Nigeria, 1958 Revision.
3. See S.115(2) Matrimonial Causes Decree, 1970.
4. [1866] L.R.1 P and D., 130, see further Chapter X, pp.127-133.

PART TWO

The Status of Women in Customary Law Marriage.

Chapter III : The Nature and Types of Customary Law Marriage.

" IV : Polygamy and Its Effects on the Status of Women

" V : Formation of Marriage (1).

" VI : Formation of Marriage (11).

" VII : The Incidents of Marriage.

" VIII : Dissolution of Customary Law Marriage.

CHAPTER III

THE NATURE AND TYPESOF CUSTOMARY LAW MARRIAGE

> "Marriage is the destiny traditionally offered to women by society. It is still true that most women are married, or have been, or plan to be, or suffer from not being".
>
> Simone de Beauvoir - The Second Sex.[1]

1. The Nature of Customary Law Marriage

A. Introduction

In traditional Nigerian society, marriage is the main occupation of the overwhelming majority of women. In 1925, Meek noted that "the universality of marriage is one of the most characteristic features of African life, and the unmarried man is the object of derision".[2] Marriage is even more important for a woman. It is her one great object in life. If she fails in that she is considered to have nullified her existence, and not to be married is a major misfortune for which there are few compensations.[3] A Woman's glory is to have children, and marriage brings children. Although the "single" status is less devastating for women in modern society, and there are now other acceptable avenues, such as business or professional careers, marriage remains a desirable goal for the large majority of Nigerian women, and most women express a desire to be married at least once in their life-time.

It has been seen that most Nigerian women contract a customary law marriage.[4] A pertinent question at this point is whether the relationship of husband and

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1. Edit. and trans. by H.M. Parshley (Penguin Books, 1976), p. 445.
2. Meek, Northern Tribes of Nigeria, op.cit.,Vol.II, p.239; see also Damanchi, Nigerian Modernization, op.cit., p.26.
3. See Basden, Niger Ibos, op.cit.,p.213; an unmarried woman among the Igbos is scorned and mocked; see also John Jordan, Bishop Shanahan of Southern Nigeria (Dublin: Clonmore and Reynolds Ltd., 1949), p.221.
4. See Chapter II, above, pp. 172-174 and Table 2:1.

wife which in European societies constitutes marriage, exists in its essentials in a customary marriage? In other words, can the union between a man and a woman which is regulated by the customary laws of their particular society be properly regarded as a "marriage", even though it differs in certain fundamental aspects from what is generally regarded as marriage in modern Western societies.

With reference to the universality of marriage as an institution, Bryce notes:

> "In all communities that have risen out of the savage state, no legal institution is at once so universal, and also so fundamental, a part of their social system as is marriage....None has appeared under more various forms, or been more modified by law, when sentiment or religion prescribed a change....Yet it so happens that there is no relation with which custom and legislation have, in different peoples and at different times, dealt so differently. Nature must surely have spoken with a very uncertain voice when, as the jurist says, she 'taught this law to all animals'".[1]

The sentiment expressed in the above passage may seem so obvious as to make their quotation pedantic, but it is an undisputed fact, that not a few scholars, jurists, anthropologists, religious enthusiasts, and even governments have denied the claim of unions celebrated under customary systems of law to be categorised as marriages in the "Western" or "Christian"[2] sense of the word.

The reluctance to assign to customary law unions the appellation of "marriages" can be attributed to a variety of reasons. Most of these reasons have been aptly summarised by Westermarck,[3] who discounts the accuracy of the statement that certain peoples live, or have lived in

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1. James Bryce, Studies in History and Jurisprudence, 2 Vols. (New York: Clarendon Press, 1901), Vol.II, p.782.
2. The term "Christian" is not used in the religious sense, but to describe the monogamous character of the marriage; see Brinkley v. Attorney General, [1890]15 P.D. 76; Nachimson v. Nachimson [1930] P.217, C.A.
3. Edward Westermarck, The History of Human Marriage, 3 Vols. (London: MacMillan and Co. Ltd., 1921), Vol.I, p. 124.

a state of promiscuity, without any family ties. He concludes that all cases where this promiscuous state is said to exist are

> "simply misrepresentations of theorists, in which sexual laxity, frequency of separation, polyandry, group marriage or something like it, or absence of a marriage ceremony or of a word for "to marry" or of a marriage union similar to our own are confounded with promiscuity".[1]

B. The attributes of customary marriage

The main features of customary law marriage which qualify such unions for segregation as a separate type of institution not worthy of the appellation 'marriage' are:

(i) the fact that all systems of customary law, at least in Nigeria, approve of the practice of polygyny; The possession of several wives by prominent African men has particularly antagonized European observers of African marriage;

(ii) the ease with which a customary marriage may be dissolved in theory has led to the unjustified accusation that such unions are "brittle" and unstable, being subject to dissolution at the whim of either spouse, particularly the husband;

(iii) the payment of "marriage consideration" or dowry, in the form of some kind of property, or services, by or on behalf of the bridegroom, to the family of

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1. Ibid., p.121. For similar views on the universality of marriage see Paul Vinogradoff, Outlines of Historical Jurisprudence, Vol.1.(London: Oxford University Press 1920) pp.163 et al; A.R. Radcliffe-Brown and Daryll Forde, eds., African Systems of Kinship and Marriage, (London: Oxford University Press, 1950 11th. imp, 1975), p.43; Arthur Phillips and Henry Morris, eds., "Marriage Laws in Africa", (London: Oxford University Press, 1971), pp. 3-5; A.N. Allott, "Marriage and Internal Conflict of Laws in Ghana", J.A.L. [1958] pp.164-183, at p.172, D'Oliver C. Farran, "Matrimonial Laws of the Sudan", (London: Butterworths, 1963), pp.29-30; Margaret Mead, Male and Female : A Study of the Sexes in a Changing World (U.S.A. 1949, Penguin Book 1976), p. 181.

the bride, in most systems of customary law, has characterised customary marriage as "wife purchase";[1]

(iv) the large measure of control exerted by the families of the spouses in the formation, continuance and dissolution of a customary marriage, has led to the assertion that customary marriage is predominantly a union between two families, rather than between two individuals. The families' right of control of all aspects of the marriage, it is alleged, often dictates the choice of spouse, especially in the case of the bride, and invariably dispenses with the consents of the spouses;

(v) certain incidents of customary marriage, for example, the so-called "widow-inheritance", and the legal right of the husband to own and control property acquired by his wife, in many societies, are particularly revolting to modern European opinion;

(vi) the rituals and ceremonies which were customarily performed on the occasion of a marriage have given rise to aspersions of heathenism and idolotry, especially by religious observers;

(vii) the emphasis placed on procreation of children as the chief aim of marriage in African societies has also been the subject of adverse criticisms.

C. Colonial attitudes to customary law marriage

The references to customary marriage as not meriting the term "marriage" are as many and as motley as the reasons advanced for the discrimination, and compete for inclusion as evidence of their existence, but for present purposes, a few of these comments will amply illustrate the prejudice with which customary law marriage has been previously regarded. For its chronological significance and virulence, pride of place must be given to the opinion of the former Acting Chief Justice of the Gold Coast Colony,

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1. See e.g. R.V. Amkeyo [1917] 7 E.A.L.R. 14 at p. 16.

Thomas W. Jackson. In attempting to justify his reasons for advocating the enactment of a marriage ordinance, under which only a religious ceremony would constitute a valid legal marriage, the learned Chief Justice expressed his opinion of customary law marriage thus:

> "Native marriage. The term is vicious, as marriage connotes exclusiveness and indissolubility as its immediate and palpable advantages. Among many other advantages, it enables the man to obtain a number of women whom he can employ in labour or trade with confidence. It ensures to the woman, however, ill-favoured by nature the certainty of not being compelled to pass her life in single blessedness. Its cause has been advocated by Godwin, Shelley, and Mill. It is still respectable in the colony, and as a mode of existence would never be forsaken by the native for the civil marriage. In such a state of things the missionaries have, regardless of the law, been for more than fifty years, by education, example, and particularly by the setting forth in lively description the awful torments that most certainly await all persons who venture to cohabit without marrying, endeavouring, and with great success, to persuade the natives to become Christians, and to make and keep marriage vows".[1]

No long comment is necessary, since the passage speaks for itself, except to point out that the learned Judge failed to see the virtue of every woman, regardless of her attractions, (or lack of them), reaching final fulfilment as a wife and mother. His prejudice overwhelmed his judgment to such an extent that the virtue which should have contributed to the reprieve, if not acquittal, of polygamous marriage, was used as evidence for its condemnation and annihilation. How great was the measure of success achieved by the missionaries will be dealt with in due course,[2] but it is pertinent to note here that the euphoric optimism of the Chief Justice was

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1. Great Britain, Public Record Office, Gold Coast Marriage law, C.O. 879/20, Dispatch 441, dated 18 Sept. 1882, enclosure No. 5 of Number 18, p. 210. See further, Chapter XI below.

2. See further below, pp.216-217;
See also above, Chapter II, pp. 172-174; and Table 2:1, p.175.

as misconceived as his perception of the true nature of customary marriage.

Thirty eight years later, and hundreds of kilometres across the continent, from West Africa to East Africa, Justice Jackson's views of customary marriage were echoed by another English judge in R.V. Amkeyo.[1] Chief Justice Hamilton stated that "the word 'marriage' to describe the relationship entered into by an African Native with a woman of his tribe according to tribal custom, is a misnomer which has led in the past to a considerable confusion of ideas".[1] He continued:

> "I know of no word that correctly describes it; 'wife-purchase' is not altogether satisfactory, but it comes much nearer to the idea than that of marriage as generally understood among civilised peoples".[1]

It may be noted that this was also the attitude adopted by the English courts in a long line of cases, in which they consistently refused to recognize polygamous, or potentially polygamous marriages, for the purpose of matrimonial relief. As early as 1835, Lord Brougham, in Warrender v. Warrender,[2] made the following statement:

> "If indeed there go two things under one and the same name in different countries - if that which is called marriage is of a different nature in each - there may be some rule for holding that we are to consider the thing to which the parties have bound themselves according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status, from Turkish

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1. [1917] 7 E.A.L.R. 14, at p. 16.

2. [1835] 2 Cl. and Fin. 488 at p. 531; see also Nachimson v. Nachimson [1930] 2 P. 217 at 237, C.A; Re Bethel [1888] 38 Ch.D. 220, which involved the customary law marriage of the Baralong tribe of Bechuanaland. This decision seems to deny any recognition whatever to a polygamous marriage. Cf. Baindail v. Baindail [1946] P. 122, 125 C.A., per Lord Greene M.R.; The Sinha Peerage Claim [1946] 1 All E.R. 348; Srini Vasan v. Srini Vasan [1946] P. 67 [1945] 2 All E.R. 21. Mehta v. Mehta [1945] 2 All E.R. 690.

> or other marriages among infidel nations, because we clearly never should recognize the plurality of wives and consequent validity of second marriages, standing the first, which second marriage the laws of those countries authorise and validate".

The case in which this statement was made involved a Scottish appeal to the House of Lords, the question being whether a marriage celebrated in England between a Scotsman and an English woman could be judicially dissolved in Scotland. There was, therefore, no occasion for the learned Judge to discuss the validity of polygamous marriages at all, but his dicta have had a profound effect on the development of the law, although much ingenuity, judicial[1] and academic,[2] has been expended on the effort to discover precisely what he meant by the above remarks.

Lord Brougham's views were approved in the leading case of Hyde v. Hyde,[3] where Lord Penzance, referring to polygamy, and to women married polygamously, said:

> "...the status of these women in no way resembles that of a Christian 'wife.' In some parts they are slaves, in others perhaps not; in none do they stand, as in Christendom, upon the same level with the man under whose protection they live. There are, no doubt, in these countries laws adapted to this state of things - laws which regulate the duties and define the obligations of men and women standing to each other in these relations. It may be, and probably is, the case that the women there pass by some word or name which corresponds to our word 'wife'. But there is no magic in a name; and, if the relation there existing between men and women is not the relation which in Christendom we recognise and intend by the words 'husband' or 'wife,' but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the

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1. For example, Lush L.J. in Harvey v. Farnie [1881] 6 P.D. 35 at p. 53; Stirling, J., in Re Bethel [1888] 38 Ch.D. 220, at p. 234.

2. See Dicey, Dicey's Conflict of Laws, 6th ed. by J.H.C. Morris with Specialist Editors (London: Sweet and Maxwell, 1949), p. 224, n.62; Fitzpatrick, "Non-Christian Marriage", 2 Journal of Comp. Legislation and International Law, 2nd. Ser., 1900, p. 359 at p.375; J.H.C. Morris, "The Recognition of Polygamous Marriages in English Law" 66, Harvard Law Review, 1953, p. 961-1012, at pp. 965-966.

3. [1866] L.R.1 P & D 130, [1866] 14 L.T. 188.

> same, though it may tend to confuse them to a superficial observer".[1]

Lush, L.J., in Harvey v. Farnie,[2] noted that "there is no analogy whatever between the union of a man and a woman in a country where polygamy is allowed and the union of a man and a woman in a Christian country", and in Brinkley v. Attorney General,[3] it was said that "a marriage which was not that of one man and one woman, to the exclusion of all others, though it may pass by the name of a marriage, is not the status which the English law contemplates when dealing with the subject of marriage".

These passages abundantly illustrate the early English judicial attitude towards polygamous marriages, and marriages according to customary law which were potentially polygamous.[4]

During the past thirty years, the attitude of English judges towards polygamous marriage had become progressively more liberal, and a measure of recognition had been accorded to such marriages for limited purposes.[5] In 1968, in Mohamed v. Knott,[6] which involved a Nigerian

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1. Hyde v. Hyde [1866] L.R.1 P. & D. 130, at pp.133-134.
2. [1881] 6 P.D. 35, at p. 53. C.A.
3. [1890 15 P.D. 76, at p. 79.
4. See also Sowa v. Sowa [1961] 1 All E.R. 687, C.A. [1961] P. 80; Ohochuku v. Ohochuku, [1960] 1 All E.R. 253; Lee v. Lau [1967] P.14; Imam Din v. N.A.B.[1967] 2 Q.B. 213.
5. See e.g. Sinha Peerage Claim [1946] 1 All E.R. 348; Coleman v. Shang [1961] AC.481; Baindail v. Baindail [1946] P.122, C.A; Cheni v. Cheni [1962] 3 All E.R.873; W.E. Beckett, "The Recognition of Polygamous Marriages Under English Law", 48 L.Q.R. 341; See also Joseph H. Beale, A Treatise on the Conflict of Laws,3 Vols. (New York: Baker, Voorhis and Co., 1935), Vol. 2, pp. 699-701; S.G. Vesey-Fitzgerald;"Nachimson's and Hyde's Cases," 47, L.Q.R., 1931, pp. 253-270; John Delatre Falconbridge, Essays on the Conflict of Laws, 2nd ed. (1947), Toronto,; Canada Law Book Co.,1954), Chapter 40, pp. 776-788; Dennis Fitzpatrick, "Non-Christian Marriage", Journal of the Society of Comparative Legislation, New Series, Vol. II, 1900, pp. 359-387.
6. [1968] 2 All E.R. 563; [1969] 1 Q.B.1.

marriage according to Islamic law, Lord Parker, C.J., stated that "a polygamous marriage is now recognised in this country unless there is some strong reasons to the contrary",[1] and in 1972, for the first time, the Matrimonial (Polygamous Marriages)Act, 1972, enabled matrimonial relief to be granted, notwithstanding that the marriage was polygamous. Section 47 of the Matrimonial Causes Act, 1973, now provides that "a court in England and Wales shall not be precluded from granting matrimonial relief or making a declaration concerning the validity of a marriage by reason only that the marriage in question was entered into under a law which permits polygamy".[2]

Most of the adverse criticisms of the customary law are based on inadequate knowledge of the law as practised by the majority of the people in any given society. Foreign observers of African marriage invariably base their opinions on isolated incidents, personally witnessed or related to them, rather than on the practice of the majority of the society.[3] For example, a few cases

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1. Citing Dicey and Morris, The Conflict of Laws, 7th ed. by J.H.C. Morris et.al., (London: Stevens and Sons, 1973), r. 37.

2. See Poon v. Tan [1973] Family Law, 1974, p. 161; Chaudary v. Chaudary [1975] 3 All E.R. 687; [1976] 1 E.R. 805, C.A. (affirmed on other grounds); R.V. Sagoo [1975] 3 W.L.R. 267, C.A.

3. See the Address of the Minister of Internal Affairs at the second reading of the African Law and Tribal Courts Bill, 1969, in which he notes "the conception or misconception of African law derived from the tales of early travellers and explorers who, quite naturally, like our modern newspapers picked out the newsy sensational episodes of life, the abnormal, the exciting, and describe with grim conclusions the sorcery, the trials by ordeal, the ferocious and impetuous orders to cut off lips and ears, the tortures and impaling of victims", Rhodesia Parliamentary Debates, Official Report, unrevised, Vol. 73, No. 11, 28 Jan. 1969, D. 617.

in which the husbands have arbitrarily divorced their wives after a short period of married life, and for no apparent reason, may lead to the erroneous conclusion that marriage in that society is unstable and easily dissolved, unless the fact that for the majority of the population marriage is a life-long union, is taken into account in assessing the degree of marital instability. In other words, the practice of the majority of married people, and not of a few individuals in the society, should be the norm which determines the nature of the marriage bond.

Another reason why Westerners have tended to disparage customary law marriage is ignorance, or probably disregard, of comparative historical jurisprudence. Fletcher, in The Family and Marriage in Britain,[1] makes the pertinent point that, "in general, all peoples are greatly ignorant about the past of their own society, and this accounts for the fact that they tend always to glorify it". Throughout this thesis, as far as possible, attention will be directed to the marriage laws of other nations at an earlier period of their history. The comparisons will serve to spotlight the remarkable similarity of development of the marriage laws of various peoples, and to demonstrate the fact that most of the features which now pertain to customary law marriage in many parts of Africa, including Nigeria, were present, comparatively recently in some cases, in the marriage laws and customs of the majority of the peoples of Europe. Vinogradoff noted that

> "monogamy itself is tribal custom, influenced but not created by Christianity. It was gradual and began at an early stage, among those who had small means".[2]

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1. Ronald Fletcher, The Family and Marriage in Britain: An Analysis and Moral Assessment 3rd. ed. (1962, Penguin Books 1975), p. 31.

2. Vinogradoff, Historical Jurisprudence, p. 238; C.K. Allen, Law in the Making, 4th. ed. (London: Oxford University Press, 1946), p. 74.

From this statement it is evident that polygamy was formerly practised. For those who could not afford the luxury of polygamy, the practice of marrying only one wife gradually replaced polygamy, until monogamy became the norm, instead of the exception. A similar trend, which will be elaborated later, can now be discerned among most Nigerian communities.

The description of a wedding according to old English law, recorded by Vinogradoff, reveals many of the features of the present African customary marriage:

> "If people want to wed a maid or a wife and this is agreeable to her and to her kinsmen, then it is right that the bridegroom should first swear according to God's right and secular law and should wage (pledge himself) to those who are her for-speakers, that he wishes to have her in such a way as he should hold her by God's right as his wife - and his kinsmen will stand pledge for him.
>
> 'Then it is to be settled to whom the price for upfostering her belongs, and for this the kinsmen should pledge themselves.
>
> 'Then let the bridegroom declare what present he will make her for granting his desire, and what he will give if she lives longer than he does.
>
> 'If it is settled in this way, then it is right that she should enjoy half the property, and all if they have a child, unless she marries another man. 'All this the bridegroom must corroborate by giving a gage, and his kinsmen stand to pledge for him.
>
> 'If they are agreed in all this, then let the kinsman of the bride accept and wed their kinswoman to wife and to right life to him who desires her, and let him take the pledge who rules over the wedding.
>
> 'If she is taken out of the land into another lord's land, then it is advisable that her kinsmen get a promise that no violence will be done to her and that if she has to pay a fine they ought to be next to help her to pay, if she has not enough to pay herself".[1]

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1. Quoted by Vinogradoff, Outlines of Historical Jurisprudence, Vol.1, pp. 252-253 from Lieberman, Gesetze der Angelsachsen, Vol.1, p.442; see also Vinogradoff, op.cit., pp.236-260 for other similarities in the development of English marriage; Radcliffe-Brown and Forde, African Systems of Kinship and Marriage, op.cit.,pp. 44-49.

From this description marriage is an agreement between the family of the bridegroom and that of the bride, for a consideration from the bridegroom and his kinsmen paid to the bride's family. The amount of consideration or dowry payable, as well as the property the wife should enjoy if the husband predeceases her are subject to agreement between the kinsmen of both parties. The bridegroom's kinsmen pledge themselves to honour his pledges, while the bride's kinsmen agree to pay any amount which the bride may incur as fines for her misbehaviour if she herself is unable to pay. The bridegroom and his kinsmen are also responsible to the bride's kinsmen for her safety.

Points of similarity between the marriage described in the above passage and a customary marriage will be better appreciated after the discussion of a typical customary marriage, but it may be noted here that the marriage described in the above is a private affair between the spouses and their families without any State intervention.[1] Although the prospective spouses have to agree to the marriage, the agreements of their kinsmen are also essential, and there is no mention of romantic love which is such a prominent feature of modern English marriage.[2]

D. The adoption of customary law principles by modern legislation

An important point to be noted is that marriages in many modern European societies are currently drawing closer to customary marriage, both in law and in practice. Legislators have adopted some of the principles, as well

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1. Cf. the position in Scotland where it is still possible to establish retrospectively a marriage 'by cohabitation with habit and repute. This arises where couples set up a home together, and live as a married couple; Kilbrandon Report: Report of the Departmental Committee appointed to enquire into the law of Scotland relating to the Constitution of Marriage, The Marriage Law of Scotland, 1969, Cmnd. 4011, Chapter I.
2. See Fletcher, The Family and Marriage in Britain, op. cit., p. 375; "marriage has not always been based upon the 'personal love' of the partners - that basis of marriage with which we are most familiar. Marriage has sometimes been based upon capture, on the payment of a 'bride-price', on the decision of elders, on property arrangements, and on other criteria".

as the methods traditionally known to customary law marriage, to solve the problems posed by modern societies. Specific cases will be pinpointed in the appropriate contexts, but a few examples will illustrate the modern trend.

(i) A striking example of legislation which embodies a traditional customary law principle relating to marriage is the recent English Divorce Reform Act of 1969[1], under which all the former grounds for divorce were reduced to a "sole ground" - that the marriage has broken down irretrievably. Irretrievable breakdown postulates the possibility of reconciliation, and provision is made in the Act[2] for reconciliation of the spouses before a decree of divorce is granted.

Reconciliation of the spouses of a marriage is a familiar procedure to many systems of customary law marriage in the traditional society, and before a divorce is accepted by the families, protracted efforts are made by both sets of families to effect the reconciliation of the spouses. A divorce is only accepted when it is conceded, after failure of all reconciliation efforts, that the spouses can no longer live amicably together and that the breakdown of the marriage is inevitable.[3] In other words, the marriage has broken down irretrievably.

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1. This Act has been repealed and re-enacted in the Matrimonial Causes Act, 1973.

2. See Matrimonial Causes Act, 1973, sections 6(1), 6(2). Cf. S.M.Cretney, Principles of Family Law, 2nd. ed. (London: Sweet and Maxwell, 1976), p. 153; "The Divorce Reform Act introduced for the first time the notion of reconciliation as a positive feature of matrimonial litigation"; Nicholas Tyndall, "Reconciliation and the Divorce Reform Act, 1969". L.S. Gaz, 1971, pp. 37-39. A.H. Manchester and J.M. Whetton, "Marital Conciliation in England and Wales, 23, I.C.L.Q., 1974, p. 339; E.J. Griew, "Marital Reconciliation; Contexts and Meanings", C.L.J, 1972 A, pp. 294-315; Finer Report: Report of the Committee on One-Parent Families,1974, Cmnd. 5629, paras. 4.288-4.335.

3. See further below, Chapter VIII.

The English Divorce Reform Act of 1969, has been substantially reproduced in the Nigerian Matrimonial Causes Decree, 1970,[1] and reference to the adoption of the customary law procedure for divorce will be elaborated further when discussing the provisions of the Decree.[2]

(ii) Another example of legislation which mirrors customary law attitude and policy is the increased legal rights and duties given to, and imposed on, illegitimate children and their parents, by a number of statutory provisions. In English law, practically all the former legal disabilities of an illegitimate child and its parents have been abolished by statute.[3]

A greater degree of social tolerance of illegitimacy has accompanied the increased legal rights, and many of the discriminatory social conventions have also disappeared.[4]

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1. Decree No. 18 of 1970; see also Australia - Section 14 Matrimonial Causes Act, 1959; New Zealand - sections 13 and 14 Domestic Proceedings Act, 1968. The Conciliation Court of Los Angeles County, California, effected reconciliation in 45% of the 3581 cases heard in 1954-1959, and in 1968, in 73% (1311 out of 1764) of the cases reconciliation of the spouses was achieved - see H.A. Finlay, "Family Courts - Gimmick or Panacea?", 43 Australian Law Journal, 1969, pp. 602-607, ss. 7 and 8 Canada Divorce Act, 1967.

2. See below Chapter XI.

3. See e.g. English Births and Deaths Registration Act, 1953, section 10 as amended, and section 10A as inserted by Children Act, 1975, section 93; Family Law Reform Act, 1969, sections 14, 15 and 16; Children Act 1975, sections 85 (7); J.H.C. Morris, "The Family Law Reform Act, 1969, Sections 14 and 15", 19 I.C.L.Q. Vol. 19, pp. 328-333; E.C. Ryder, "Property law Aspects of Family law Reform Act, 1969", Current Legal Problems, 1971, pp. 157-177; Legitimacy Act, 1959; Matrimonial Causes Act, 1973, section 16.

4. See P.M. Bromley, Family Law, 5th edition;(London: Butterworths, 1976), p. 300; I. Pinchbeck, "Social Attitudes to the Problem of Illegitimacy", British Journal of Sociology, 1954, pp. 309-323; S. v. S. [1972] A.C.24 57, per Lord Hodson "the legal incidents of being born a bastard are now also almost non-existent"; cf. Colin Smith Ltd. v. Ridge [1975] 1 W.L.R. 463, at p. 467, per Lawton J. - a man is not obliged to house his illegitimate children.

> Some writers suggest that illegitimacy as a legal concept is unknown to traditional customary law. This proposition is open to question, and is discussed further in a later chapter[1] but there is considerable evidence that the traditional customary laws of many societies impose few, if any, legal disabilities on persons whose parents were not legally married at the time of their conception or birth.[1]

In many Nigerian systems of customary law, an illegitimate child whose mother was unmarried at the time of its conception or birth, if acknowledged by its natural father, is treated exactly like a legitimate child of its father, with regard to affiliation, inheritance and succession. Acknowledgement of illegitimate children is a prominent feature of Yoruba customary law, and was adversely criticized by Osborne, J., in the old Nigerian case of Re Sapara,[2] decided in 1911, as follows:

> "The consideration of the law of native marriage is beset from the start with great difficulty. The sexual relations are viewed from such totally different standpoints by Europeans and natives of West Africa that it is hard for a European to understand native ideas on the subject...in English law marriage is necessary to legitimize the offspring of two persons, such offspring if illegitimate having no right of inheritance; but under native law a child's right of succession to his father's property can be legalised by mere acknowledgment of paternity, without the necessity of any form of marriage between his parents. Consequently, the legal importance of the marriage ceremony is not nearly so great under native law as it is under the law of England".

The learned Judge's obiter dictum with reference to legitimation under English law is not strictly accurate, since it has always been possible in English law for the legislature to legitimate a person illegitimate at common

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1. See below, Chapter XIII, p481-483.
2. [1911] Renners Law Report, 605.
3. Ibid., at pp. 606-607.

law. Bromley notes that occasionally, a special Act has been passed for that purpose, although there have been no instances of an Act of this sort in modern times.[1]

Osborne J's dictum also betrays disregard of European historical jurisprudence. Pinchbeck, in his historical survey of illegitimacy, produces evidence to show that among most European nations, illegitimate children were acknowledged as part of their father's family with some right to share in heritable property.[2] It was not until the early seventeenth century that the Irish custom of gavelkind under which estates were distributable among bastards as well as lawful kin, was abolished by judicial decision.[3] In England, while the illegitimate child was from Anglo-Saxon days excluded from inheritance, Pinchbeck advances ample historical evidence to show that throughout the mediaeval period it was customary in many sections of society to treat the illegitimate child in all other respects as a member of his father's family.[4] Pollock and Maitland, speaking of early English law, note the fact that

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1. Bromley, Family Law, op.cit., p. 279. Acknowledgement of an illegitimate child by its natural father is possible under some European legal systems, e.g. in the U.S.S.R. under the New Fundamental Principles of Family Law, introduced in 1968, paternity may be established by recognition, or by a judicial finding.

2. I. Pinchbeck, "Social Attitudes to Illegitimacy", op. cit., pp. 312-313; "Just as the African native who accepts Christianity today frequently finds himself at variance with Christian views on marriage and retains his several wives, so in Europe, extra-marital relations everywhere persisted, while the nations outside the mainstream of Western civilization continued for centuries to treat illegitimate children as members of the family."

3. "By the Irish custom of gavelkind the inferior tenanties were partible among all the males of the Sept, both Bastards and Legitimate", see Henry Sumner Maine, Lectures on the Early History of Institutions (London: John Murray, 1889), p. 186.

4. Pinchbeck, "Social Attitudes to Illegitimacy", op.cit., 314-317.

"bastardy cannot be called a status or condition. The bastard cannot inherit from his parents or anyone else, but this seems to be the only temporal consequence of his illegitimate birth....In all other respects he is the equal of any other free and lawful man".[1] Pinchbeck says:

> "Throughout the early centuries of our history and indeed right into the eighteenth century, many fathers appear to have been willing to acknowledge their natural children and to rear and educate them with their lawful offspring. The ease with which the bastard of gentle birth could intermarry with the highest families in the land is further evidence that inferiority of legal status was not accompanied by loss of social caste. Moreover, in English medieval law the bastard suffered under none of the harsh disabilities which degraded him in continental lands, such as loss of freedom or personal rights".[2]

Pollock and Maitland suggest that the reason for this divergence of English from continental law may be "due to no deeper cause than the subjection of England to kings who proudly trace their descent from a mighty bastard".[3] William the Conqueror made no disguise of his illegitimate origin, and frequently styled himself "William the Bastard".[4]

It would seem from the above statements that the sexual relations are not "viewed from such totally different standpoints by Europeans and natives of West Africa" as Judge Osborne believed. There are many communities in Nigeria where illegitimate children cannot be acknowledged by their natural fathers for the purposes of affiliation and inheritance under customary law.[5]

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1. F. Pollock and W. Maitland, The History of English Law Before the Time of Edward I, 2nd ed. (London: Cambridge University Press, 1968), Vol. II, p. 397.
2. Pinchbeck, "Social Attitudes to illegitimacy", op.cit., p. 313; See also Pollock and Maitland, op.cit., "The Canon Law itself admits that children are legitimate who are not the offspring of a lawful wedlock". - Vol. II, p. 375.
3. Pollock and Maitland, op.cit., Vol. II, p. 397.
4. Pinchbeck, op.cit., p. 313.
5. See Nwogugu, Family Law in Nigeria, op.cit.,pp. 230-231; and Onwudinjoh v. Onwudinjoh [1957] 3 E.R.N.L.R. 1.

In 1926, fifteen years after Osborne, J.'s judgment in Re Sapara,[1] modern English law approximated to the position under Yoruba customary law by the enactment of the first English Adoption Act, under which an illegitimate child, if adopted by its natural father, is entitled to inheritance and other legal rights as if he were a legitimate child of his father. Acknowledgement of paternity in customary law bears a striking resemblance to adoption by a man of his natural child under English law.

Since 1926, a number of statutes has brought the legal status of an illegitimate child in English law closer to the status of the illegitimate child in many systems of customary law in Nigeria. As previously noted, recent legislation has tended in many respects to assimilate the legal position of an illegitimate person to that of a legitimate one, especially in relation to proprietory rights.[2]

One is compelled to agree with Diamond's conclusion that

> "the history of law is forever repeating itself and the same stages that were reached many thousands of years ago in the East are being reached and past in parts of the modern world".[3]

E. The prestige of customary law marriage in Nigeria

In the 1850's, Clarke, a traveller and explorer, noted that customary law marriage was highly regarded among

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1. [1911] Renner's Law Report, 605.
2. See Bromley, Family Law, op.cit., pp. 577-578; Cretney, Principles of Family Law, op.cit., pp. 410-421; see also Coleman v. Shang [1961] A.C. 481 at 493. A private member's Bill, sponsored by M.Ps. James White and Leo Abse, designed to end the remaining disabilities suffered by illegitimate children, although it expressly exempted from its provisions the Adoption Acts, so that a father's consent to the adoption of his illegitimate child would not be needed, did not manage to get a second reading on 23 February, 1979, see Family Law, Vol.9, No. 2, 1979, p.34.
3. Arthur S. Diamond, Primitive Law; Past and Present, (1935, London: Methuen, 1971), p.1. See also Wokoko v. Molyko [1938] 14 N.L.R. 41.

the Yorubas. He viewed it as one of the main pillars in their social fabric that gave to it beauty, strength and durability.[1] Acting Chief Justice Jackson, in 1882, in the passage quoted above,[2] stated that customary law marriage was "still respectable" in the Gold Coast Colony (which included Lagos and adjacent Territories), and would never be voluntarily forsaken by the natives for a civil marriage. It is significant that marriage according to customary law has retained a high prestige among the indigenous population of Nigeria, despite the introduction of two other types of marriage.[3]

Among most Northern Moslem communities, the process has been one of integration of Islamic law principles of marriage and customary law principles, facilitated by the similarity between the two types of marriage laws, rather than the adoption of the Islamic law marriage in its entirety.

In the Southern States, it has been previously shown that the majority of the population contract a customary marriage to which they sometimes add a statutory marriage. Many of the early protagonists for the abolition of customary marriage would be surprised at the fact that after more than one hundred and twenty years of missionary activity aimed at discrediting customary marriage and replacing it with "Christian" marriage, customary marriage remains popular and the preferred type of marriage in Nigeria.

Undoubtedly, most Nigerian women would like to contract a statutory marriage, but this must be in addition to, and not instead of, a customary marriage. Hastings notes

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1. William Clarke, Travels and Explorations in Yorubaland 1854-1858, (Nigeria: Ibadan University Press, 1972), p.246; see also Adrian Hastings, Church and Mission in Modern Africa (London: Burns and Oats, Ltd. 1967) p.163.
2. See above, p. 202.
3. See above, Chapter II, Table 2:1, p.175.

that "in most areas marriage in church is not an alternative to tribal marriage: it is additional". The ceremony in church is seen as a religious extra, a blessing upon the union.[1] In many communities, a person is not regarded as properly married, despite prestigious ceremonies in a Church or marriage registry, if he, or more particularly she, is not married in the customary manner. This high regard for customary marriage, especially in the case of women, often contributes to marital discord. Many women, for one reason or the other, for example, failure to get parental consent for their marriage, contract a statutory marriage, in the hope that this would be followed by a customary marriage later, when they have won their parents over to their choice of husband. If for any reason (especially if it is due to the husband's fault), this hope is not realised, the frustration and disappointment of the wife can lead to the break up of the marriage.

A typical case where the wife's disappointment at the husband's failure to conclude a customary marriage, after a statutory marriage, resulted in divorce is Onuorah v. Onuorah.[2] The parties were married in a Marriage Registry Office under the Nigerian Marriage Act. The husband sued for a divorce on the ground of desertion. He claimed that his wife refused to follow him when he was transferred to Northern Nigeria by his employers. The wife, a university lecturer, said she refused to accompany him on transfer, because he would not perform the traditional rites according to Onitsha customary law in respect of their marriage, as he had promised to do before their marriage in the Registry Office. His refusal to contract a customary law marriage was a cause of marital friction between the parties and one of the key factors which eventually led to a divorce being granted by the Court.[3]

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1. Hastings, Church and Mission in Modern Africa, op.cit., p. 168.
2. [1972] Suit No. E/27D/72, unreported; Enugu High Court.
3. For similar cases see below, Chapter XI.

2. The Definition of Customary Law Marriage

Is it possible to define marriage under African customary law? Cotran believes it is not. He says:

> "I would say that it is impossible to put forward a definition which would cover marriage as recognized and known under the multitude of African customary laws, differing and conflicting as they do in such material respects as their political and social structure, kinship groupings, descent systems, economic way of life and so on".[1]

The variations which customary marriages present are universally acknowledged, but writers generally agree that African customary marriage, diversified though it may be in form, nevertheless reveals broad basic principles common to many communities. Differences in the contents of detailed rules do not necessarily preclude similarities in the ultimate purpose for which they are designed, or in some broad features and essential characteristics.[2] If it is accepted that a definition differs from a description, and is satisfactory provided it conveys the essential nature of the *res* defined, it is possible to formulate a general definition of customary marriage which would adequately cover the basic essentials of marriage recognized and practised by the various Nigerian communities.

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1. Eugene Cotran, "The Changing Nature of African Marriage", in Family Law in Asia and Africa, ed. J.N.D. Anderson, (London: George Allen and Unwin Ltd. 1968) p. 15.

2. See e.g. T.O. Elias, The Nigerian Legal System, 2nd. edit. (London: Routledge and Kegan Paul Ltd., 1963), p.289; B.O. Nwabueze, The Machinery of Justice, 1963, op.cit., p.3; Okay Achike, "Problems of Creation and Dissolution of Customary Marriages in Nigeria", in Law and the Family in Africa, ed. Simon A. Roberts, (The Hague, Mouton, 1974) p.145; F.A. Ajayi, "The Judicial Approach to Customary Law in Southern Nigeria", Ph.D. dissertation, London University, 1958 pp.9-10, Chinwuba, S.N. Obi, Modern Family Law in Southern Nigeria, (London: Sweet and Maxwell, 1966) p. 4; C.K. Meek, Land Tenure and Land Administration in Nigeria and the Cameroons (London: Her Majesty's Stationery Office, 1957) p.178; Stanley Childs, Christian Marriages in Nigeria, 16 Africa, 1946, pp. 238-246 at p.31; Report of the Native Courts, Western Provinces, Commission of Enquiry (Ibadan, Government Printer, 1956), par.93, p.22.

Writers have advanced definitions of customary law marriage, and a few of these definitions will be discussed before formulating a definition for the purpose of this thesis.

Obi says:

> "Marriage as known to customary law may be defined as the union of a man and a woman for the duration of the woman's life, being normally the gist of a wider association between two families or sets of families".[1]

It is respectfully submitted that this definition cannot be supported for the following reasons:

(1) The definition of marriage under customary law as "the union of a man and a woman", excludes a marriage between a woman and another woman, commonly referred to as "woman-to-woman" marriage. Marriage between a man and a woman is the primary form, but it is not the only form of customary marriage in Nigeria. The marriage of a woman to another woman is regarded as a valid legal marriage,[2] and was hitherto practised by many communities in all parts of Nigeria, and in other parts of Africa.[3] Although the practice is less prevalent in the modern society, it is still found in many areas.[4]

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1. Chinwuba S.N. Obi, Modern Family Law in Southern Nigeria, op.cit. p. 155.
2. But see Meribe v. Egwu [1976] 3 S.C.23, and below p. 246,
3. See A.R. Radcliffe-Brown, in the Introduction to African Systems of Kinship and Marriage, op.cit., p.4; This type of marriage is particularly prevalent among the Nuer of the Sudan - see E.E. Evans-Pritchard, Some Aspects of Marriage and the Family Among the Nuer, (Rhodes-Livingston Paper, No.11, 1945), p.5 et.al; and among the Zulu of Natal - see Max Gluckman, "Kinship and Marriage among the Lozi of Northern Rhodesia and the Zulu of Natal" in "African Systems of Kinship and Marriage", op.cit.,p.184; the Vendas and Basutos of Southern Africa; see M.D.N. Jeffreys, "Lobolo is Child-Price", African Studies, 1951, Vol.10 No.4, p. 145-184 at p. 165.
4. See further, below pp. 241-254.

(ii) The definition may include relationships other than marriage, for example concubinage.

(iii) The definition confines the duration of a marriage to the woman's lifetime, and therefore implies that the death of the husband does not terminate the marriage, while that of the wife does. Whether this is an accurate statement of the law in some Nigerian societies is debateable, and is considered further in later chapters,[1] but there are a number of societies in Nigeria where a marriage is dissolved by the death of either husband or wife. For example, there are quite a few societies where, on the death of a woman's husband, the widow is free to dispose of herself as she pleases, without any repayment of the dowry which had been paid on the occasion of the marriage. In fact, in some societies, she is not legally entitled to remain in her late husband's house, even if she desires to do so. A few examples of societies where the husband's death terminates the marriage will suffice to support the contention.

In Ohaffia (Igbo), women are free to remarry on the death of their husbands, and they have an unfettered choice of their future husbands. No dowry is repayable to the family of the deceased husband. It is said that the people of Ohaffia view with horror, the so-called "widow inheritance", under which a widow marries another member of her deceased husband's family.[2]

The Nupe have a similar rule, and after a few months of mourning, the widow is hard-pressed to find a new husband, regardless of her age, for if she dies before she can remarry, no one will bury her. Before she remarries

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1. See Chapters VIII and XIII below.

2. Philip O. Nsugbe, Ohaffia : A Matrilineal Ibo People, (London: Oxford University Press, 1974) pp.81-82; Customary Law Manual 1977, op.cit.,p.152. In Afikpo, Arochukwu, and some other sub-groups a widow cannot be taken over by a member of her deceased husband's family.

she has no home where she has a legal right to stay.[1]

Among the Yakos, too, a widow is free to remarry when she wishes to do so. Only if widowed while suckling a child has she a right to remain for any length of time in her late husband's compound, and to be given farming facilities by one of his kinsmen. She may, or may not return to her parents or other relatives, but in any case, she cannot remarry until she has weaned the child.[2]

In the Benin laws of inheritance, widows, provided they have living children, are free to return to their families or to remarry to anyone they choose. No dowry is repayable. Should a widow's child die, and she has no surviving child about one or two years after the death of her husband, she must refund the dowry paid on the occasion of her marriage to the children of her deceased husband.[3] This rule seems to indicate that for the Benis, dowry is child-price.[4] Benin customary law may be compared with that of the nomadic Fulani, where a widow who has no children is forced to leave her deceased husband's house.[5]

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1. O. Temple, "Notes on the Tribes, Provinces, Emirates and States of the Northern Provinces of Nigeria", 2nd. ed. (Lagos: C.M.S. Bookshop 1922), p.330.
2. Darryl Forde, "Yako Studies" (London: Oxford University Press, 1964) p.125; "Marriage and the Family Among the Yako in South Eastern Nigeria", Monograph on Social Anthropology, No.5 (Published for the London School of Economics and Political Science, Percy Lund, Humphries and Co. Ltd., 1941), p.71.
3. Jacob Egharevba, "Benin Law and Custom" (1949, Germany Kraus-Thompson Organisation Ltd., 1971), p.76; see also R.E. Bradbury and P.C. Lloyd, The Benin Kingdom and Edo-Speaking Peoples of South Western Nigeria ,(1957, London International African Institute, Reprint, 1970) p.47.
4. See M.D. Jeffreys, "Lobola is Child Price", Journal of African Studies, Vol.10, No.4, 1951, pp.145-184.
5. de St. Croix, The Fulani of Northern Nigeria: Some General Notes, (Lagos: Government Printer, 1944), p.45.

In some societies in Nigeria, in which a double level of dowry is payable, whenever the small amount of dowry has been paid on behalf of the wife, on the death of her husband, the wife is automatically liberated. She is free to return to her own family and is not expected to marry any member of her deceased husband's family.[1]

In view of the fact that the above societies release a wife from the marriage bond in the event of her husband's death, a definition of customary marriage which limits the duration of the marriage to the lifetime of the wife, but not of the husband, is untenable.

Achike defines a customary marriage simply as "a union of a man and a woman which however permits a plurality of wives".[2] This definition is deficient in several respects and may equally apply to casual liaisons between a man and a woman as well as to more permanent unions. The participation of the family, an important aspect of customary law marriage is neglected by this definition.

Sohier's definition of customary marriage as "an alliance between two groups cemented by the transference of goods from one to the other, and a personal union of two persons symbolized by certain rites such as that of eating together"[3] improves on the two preceding definitions in that it is broad enough to cover "woman-to-woman" marriage, and satisfies the basic essentials of most types of customary marriage. There are, however,

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1. See S.O. Imoagene, "The Marriage System of the Weppa-Wano", African Notes, Vol.6, No.1, 1970, p.12; P. Amaury Talbot, Tribes of the Niger Delta: Their Religions and Customs, op.cit.,pp.189, 193.
2. O. Achike, "Statutory and Customary Marriage : A Comparison", The Nigerian Law Journal, 1967, Vol.2, No.1, p.49.
3. M.A. Sohier, Le Mariage en droit coutumier congolais, 1943, as quoted in Notes and News, 16 Africa, 1946, p.260; For similar definitions of marriage which recognize the fact that marriage is not limited to a man and a woman, see Leach, "Polyandry, Inheritance and the Definition of Marriage", Man 55, pp.182-186; Kathleen Gough, "Definition of Marriage", in Marriage, Family and Residence, eds. Paul Bohannan and John Middleton (New York: Natural History Press, 1968) p.68.

certain types of customary marriage, in which there is no transference of goods from one group to the other, for example, "exchange marriage", formerly practised by a number of societies in the Northern States of Nigeria.[1]

A customary marriage, for the purpose of this thesis, may be defined as a permanent union between two persons, recognized by the law of the parties concerned as creating mutual rights and duties, and invariably the nucleus of a contractual relationship between their respective families.

The union is described as permanent, because it exists until dissolved by some process recognized by the law of the particular community. The union is not for life, since in the large majority of cases, it can be dissolved by either party before death; but this fact does not alter its permanent nature until so dissolved.

The definition is not negatived by the practice of polygamy; a polygamous marriage comprises sets of single unions, with one person as the common denominator. Malinowsky correctly states that every real marriage, "whether monogamous or polygamous is based on an individual legal contract between one man and one woman, though these contracts may be repeated".[2]

It should be noted that polygamy, although permitted by customary law, is obviously not a compulsory ingredient of customary marriage, and many customary marriages are in fact monogamous. For example, during fieldwork for this thesis in Onitsha, there were no polygamous families in Umudei Village, and only about six polygamous families in Ogboli Eke. In neither of the two villages was there a case of polygamy among the under-thirty age group.[3]

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1. See below, pp.258-264.
2. Bronislaw Malinowsky, "Parenthood : The Basis of Social Structures", in The Family : Its Structure and Functions, edit. by Rose Coser, (New York : St. Martins Press, 1964), p. 10. n.2.
3. See further below, Chapter IV, Table 4:2, p.345.

3. The types of customary law marriage

A. Introduction

The literature on customary marriage presented by anthropologists enumerates sundry alleged "types of marriages" previously existing in traditional Nigerian societies, some no doubt still fondly lingering in the more remote parts of the country up to the present time. Separation of customary marriages into multifarious types may embellish the material of the social researcher, but to the legal analyst, it is an impediment to elucidation, hindering rather than promoting precise classification, a necessary element of legal exposition.

For legal purposes, in order to qualify for segregation as a separate type, a form of marriage must display some distinct legal feature. As in most parts of the world, there are in most Nigerian societies, variations in the precise modes by which marriages may be celebrated. For example, there may be different types of ceremonies by which marriage may be initiated, some of them of ancient origin, and some of them (e.g. proxy marriage), of more recent development. However, the essential characteristic of these various modes of entering into marriage is that they do not alter the normal legal incidents of the marriage which is thereby contracted.

Examination of the twenty or more types of marriage recorded[1] reveals that they do not merit treatment as separate types, since they conform in their essential legal incidents with marriages in which some payment is transferred, even though they may be peculiar in some minor details. For example:

(i) In some societies marriages may differ in the sex of the parties involved. An example of this is "woman-to-

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1. See Obi, Modern Family Law, pp.157-161; C.K. Meek, The Northern Tribes of Nigeria, op.cit., Vol.I, pp.190-213; P. Amaury Talbot, The Peoples of Southern Nigeria, op.cit., Vol. III, pp. 425-427.

woman marriage", discussed below,[1] in which a woman contracts a marriage with another woman.

(ii) Marriages may also differ in some communities in the status of the spouses. An example of this is "slave marriage" in which one or both parties had the status of a slave.[2] Among some Igbo communities a free born person (nwadiani) could not marry a slave (ohu, oru, or osu), although a slave could marry another slave.[3] Among most of the other Nigerian societies, there was no legal bar to marriage between free-born persons, male or female, and a slave, although a "slave marriage" may differ in some essentials.[4] Among the Yorubas Fadipe[5] says:

> "Theoretically, a female slave was at the entire disposal of her master and, if he decided to establish sexual relations with her, he made her his wife and thereby automatically gave her her freedom...Marriage between a freeborn woman and a slave was not looked upon with favour. It was a different matter, however, with an emancipated slave, especially if he was rich".[6]

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1. See below, pp. 241-254.
2. For slave marriages see Talbot, Tribes of the Niger Delta, p. 189; J.C. Cotton, "The Calabar Marriage Law and Custom", 4 J.A.S. 1905, pp. 427-430.
3. Ikenna Nzimiro, Studies in Ibo Political Systems: Chieftaincy and Politics in Four Niger States, (London: Frank Cass 1972), pp. 26-27.
4. See Samuel Johnson, The History of the Yorubas from the Earliest Times to the Beginning of the British Protectorate, (London: George Routledge and Sons, 1921), p.116.
5. F.A. Fadipe, The Sociology of the Yoruba, edited and with an Introduction by Francis O. Okediji and Oladejo Okediji, (Ibadan: Ibadan University Press, 1970) pp.182-183. Slave-Dealing was abolished in Nigeria by the Slave-Dealing Act, No.1, of 1874; and the status of slavery by the Slavery Ordinance 1916 (as amended in 1936).
6. For general descriptions of slave marriages, see - Talbot, Tribes of the Nigeria Delta, op.cit.,p.189; J.C. Cotton, "The Calabar Marriage Law and Custom, 4 J.A.S.,1905, pp.427-430; Thomas, Anthropological Report ...Ibo-Speaking Peoples, (London: Harrison and Sons, 1914), p.58 et.al.

(iii) Some communities distinguish between different types of marriages according to the level of dowry paid on the occasion of the marriage. An example of this is the so-called "small", and "big" dowry marriages discussed below. These marriages are essentially validated by transfer of wealth, but they vary in their incidents in some respects.

(iv) Marriages may also differ in the mode of initiation of the marriage. Examples of marriages exhibiting this kind of difference are:

(a) The eagle-feather marriage. This type of marriage is practised in the Asaba area of Bendel State and was recorded by Mockler-Ferryman in 1892 and Thomas around 1914. Thomas[1] notes that when a man puts an eagle feather in a woman's hair, she is legally bound to him whether she is unmarried or a widow. Mockler-Ferryman[2] adds that

> "when a woman is chosen for marriage in this manner, the law then permits no divorce, and commands the wife to remain with her husband till death, punishment being meted out to any man attempting to entice her away; should she, however, leave her native land, she is never permitted to return, and the husband can never claim the refund of the purchase money from the parents of an eagle-feather wife".[3]

The husband in an eagle-feather marriage was obviously not absolved from the payment of

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1. Northcote Thomas, Anthropological Report of the Ibo-Speaking Peoples of Nigeria, op.cit., Part IV, p.63.

2. A.F. Mockler-Ferryman, Up the Niger; Claude Macdonald's Mission to the Niger and Benue Rivers, West Africa, (London: George Philip and Son, 1892), p.39.

3. Neither Mockler-Ferryman nor Thomas mentions the significance of the eagle feather, but during field-work an informant stated that the eagle was a beautiful bird which only a skilled marksman could kill. It was therefore very difficult to obtain an eagle's feather, and a woman on whose head it was placed would usually regard it as an honour, since it signified that she was held in great esteem. It was alleged that the number of women married in this way was always relatively few, and the custom no longer obtains in the Asaba District.

dowry to the woman's legal guardian, and the marriage can, therefore, be categorised as a marriage by payment of dowry, differing only in its peculiar method of initiation.

(b) Proxy marriage. Uchendu[1] refers to this type of marriage as "photograph marriage". It is evident that this is not a type of marriage, but merely an expedient employed for choosing a spouse, when the man is absent from home and therefore unable to see the girl personally. The marriage may also be celebrated in his absence by proxy, if the arrangement fructifies.

This method of initiating a marriage is particularly popular among Nigerian students overseas. Parents, for fear that their sons may succumb to the charms of foreign women (an idea usually distasteful to them),[2] deluge such students with photographs of home-grown products, in the hope that they may be tempted. If the student capitulates, the marriage is celebrated by proxy at home, with all the normal ceremonies and legal incidents of marriage attached, including payment of dowry.[3] Many Nigerian girls will opt for this arrangement, even with men they would not have

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1. Victor C. Uchendu, The Igbo of South Eastern Nigeria, (New York: Holt, Rineport and Wilson, 1965), p.51.

2. See Dorothy M. Jerrome - "Continuity and Change in the Societal Organization of the Ibos in London", (Ph.D. dissertation, University of London, 1974), p.154 who points out that to marry anyone outside a group of traditionally inter-marrying communities is to "marry a foreigner", and the further one goes outside the circle, the greater is family resistance to the match; see also Edward Ward, Marriage Among the Yoruba, (Washington, The Catholic University of America, 1937), pp.11-15, for a similar attitude among the Yorubas. He relates the pitiful story of a young English wife of a Yoruba who threw herself into the lagoon because of unhappiness over family disapproval of her marriage.

3. Proxy marriages are legally binding in Nigeria; Beckley v. Abiodun, In the Matter of the Marriage Ordinance [1943] 17 N.L.R. 59.

considered for marriage while the latter were at home. The girls regard it as a means of becoming a "been to",[1] a highly regarded status in Nigeria, since, in most cases, they are sent abroad to stay with the husbands. The ultimate disillusionment of many of these women has been noted by Jerrome.[2]

(c) Marriage by chalking. By this method a wife is chosen before her birth. A man who rubs chalk on the stomach of a pregnant woman is thereby regarded as betrothed to the child when born, if it is a girl. He may marry her himself, or give her to his son as a wife. This method of initiating a marriage obtains among several groups in Nigeria.[3] It is interesting to note that rubbing of chalk on a wife is a method of initiating divorce, not only among some Nigerian communities, but among other African communities.[4]

(d) Tying on of medicine. Among the Tiv, when a man saw a girl he wanted to marry he would buy a small open-work cloth for the girl to bind round her waist. This is called "tying on the medicine". Other men would then be afraid to pay court to the girl, for fear the medicine would harm them. When the girl was grown up, and after the customary payments, she was given

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1. Interview with undergraduates of Nsukka University, held on 22nd July, 1977, at their home town in Onitsha. A "been to" is a derisive colloquial term for a person who has spent some time abroad, usually for educational purposes.

2. Jerrome, "Continuity and Change, op.cit., p.154.

3. J.W. Lieber, Efik and Ibibio Villages: Human Ecology and Education Series, (University of Ibadan, Occasional Publication, No. 13, 1966), p.22. Cf. Meek, Northern Tribes of Nigeria, op.cit., Vol.II, p.95; betrothal by tying two cowries on the waist of a baby girl.

4. See further, Chapter VIII, Chalk (Nzu) was also used for a number of purposes in traditional society, e.g. strangers were greeted with it as a symbol of peace and good reception, see Ogbonna O. Ekeghe, A Short History of Ibiriba (Nigeria, N.D.), p.51.

to him for a wife.[1]

It is evident from the four illustrations given that marriages contracted as a result of the procedures described above are not different in kind from marriages by payment of dowry. The differences may be regarded as limited to the method of betrothal in the first, third and fourth examples, and of choosing a wife in the second.

(v) Finally, the most important category of different forms of marriage is that which includes the variations in the modes of initiating marriage which significantly alter the legal incidents of the marriage. The types of marriage which merit special attention because of significant differences in their legal consequences, and consequent effect on the status of women may be classified as follows:

(a) marriage by payment of dowry.
(b) marriage by exchange.
(c) marriage by capture.
(d) marriage by mutual consent only.

B. Marriage by payment of dowry

This is generally regarded as the standard form of customary law marriage in Nigeria. Thus, Kasunmu and Salacuse state:

> "One of the most distinctive features of Nigerian customary marriage is the requirement that a payment of some sort be made by the boy or his family to the girl's family in order to establish a valid marriage. The authors are unaware of any system of Nigerian customary law which does not have such a requirement".[2]

Although the payment of dowry as a legal essential of a valid customary marriage is widespread in Nigeria, there is some evidence that in a few communities, no payment

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1. Akiga, Akiga's Story, op.cit., p.125.
2. Alfred B. Kasunmu and Jeswald Salacuse, Nigerian Family Law, op.cit.,p.77.

of dowry is necessary for the legal validity of a customary marriage. For example, Begho says of marriage according to Itsekiri customary law:

> "...payment of dowry was and is still unknown. The legality of the marriage is in the ceremony called 'La emo tsi', which is done in the presence of witnesses. It is the form that gives it legality and differentiates it from concubinage".[1]

Similarly, Talbot notes that the Munshi pay no dowry, but the first child is given instead to the wife's father; while the rest of the children belong to the husband as usual.[2]

Thomas records that no dowry is payable in money in Ugo in the eastern border of the Edo country, and presents such as kola, coconuts and yams only are made.[3]

Among the Pastoral Fulani, Stenning states that no bride-wealth changes hands at any stage of their main form of marriage,[4] while among the Yorubas, there is a legally recognized form of marriage in which no dowry is paid, and the only legal requirement is the mutual consents of the parties.[5]

An outstanding example of a customary law system of marriage in which no payment is made by, or on behalf of the man to the family of the woman, is "marriage by

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1. Mason A. Begho, Law and Culture in the Nigerian and Roman World, (Benin City: Nigeria, Mid West Newspaper Corporation, 1971), p.30; Contrast Lloyd, who says such payments are made by the Itsekiris, but they are small, see Bradbury and Lloyd, The Benin Kingdom, op.cit., p.190.
2. Talbot, The Peoples of Southern Nigeria, Vol.III, op. cit., p.454; For a similar statement about the Munshi (Tiv) see Meek, The Northern Tribes of Nigeria, op.cit., Vol.1 p.201, "among the Munshi a man may marry a virgin without making any payments, but he thereby forfeits his claim on their children".
3. Thomas, Anthropological Report on the Ibo-Speaking Peoples, Part IV, 1914, p.49.
4. Derrick Stenning, "The Pastoral Fulani of Northern Nigeria", in Peoples of Africa, edit by James L. Gibbs, (New York, Holt, Rinepart and Winston, Inc. 1965),p.386.
5. See further, below pp.276-282.

exchange", practised by many groups in the Northern States of Nigeria. As shall be shown later, no transfer of wealth was necessary in this form of marriage, as practised by the Tivs, to make it binding.[1]

In a marriage by capture, among some communities, no payment is made by the prospective bridegroom, or his family, to the bride or her family. Indeed, in many areas, inability or refusal to pay dowry is the only reason why this form of marriage becomes necessary.[2]

Confronted with such incontrovertible evidence of legally binding customary marriages which do not require any transfer of wealth in the form of property or services, the most confident statement that can be made is that for the overwhelming majority of Nigerian tribes, marriage by payment of dowry is practised, either as the sole form of marriage, or in conjunction with other types.

Marriage by payment of dowry is therefore the normal mode of contracting a marriage according to customary law in Nigeria, and will be dealt with further in detail, but it is necessary to focus attention here on three special types of marriage by payment of dowry, in order to dispel misconceived notions about them, and to pinpoint their essential features. These are:

(i) "Woman-to-woman marriage"

This form of marriage, in which a woman contracts a marriage with another woman by payment of dowry merits special attention here because of its importance to the legal status of women, and in view of the fact that writers, for the most part male, are reluctant to accord such a marriage the status of a valid legal marriage.

A good starting point is to examine a few of these writings. Elias says:

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1. See further, below pp.258-259.

2. See further, below p.268.

> "Another detestable practice among a few tribes was the system of "Woman Marriage", which consisted of a barren wife taking a woman into her household and then permitting her to "go with' other men outside, whether free or for profit. The children of such unions were usually adopted by the couple as their own. The hired woman was literally in the position of a 'wife' to the barren wife who had thus 'married' her in her husband's household".[1]

The learned writer, citing Esenwa, stated that the practice of "woman-to-woman" marriage had long been absolete and is now legally prohibited. Esenwa,[2] writing of marriage customs of Asaba in Bendel State in 1948, declared that such marriages were prohibited, but he produced no evidence of their abolition. In Iweze v. Okacha,[3] a case involving "woman-to-woman" marriage which came before the High Court of Bendel State in 1968, no mention of its illegality was made.

Obi writes in a similar vein to Elias, but he extends the category of women who contract such marriages to women who marry for their sons, or, if they are single women, for their dead fathers - a sort of ghost marriage. In all cases of "woman-to-woman marriage", he says, the marriage must be effected in the name of a man.[4]

Nwogugu makes an attempt to delve slightly deeper into the true nature of the institution, but nevertheless says such marriages may be "superficially described as the union of two women", but the true position is that there is a man in whose name the marriage is contracted and there is no question of one woman being married to the other. He admits, as does Obi, that these

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1. Elias, The Nigerian Legal System, 1963, p. 295.
2. F.E. Esenwa, "Marriage Customs in Asaba Division", The Nigerian Field , 1948, No. 13, pp.71-81 at p.74.
3. [1967 - 1968] M.S.N.L.R. 64.
4. Obi, Modern Family Law, op.cit., pp.157-158. Cf. Thomas, Anthropological Report...Ibo-Speaking Peoples, op.cit., Part IV, p. 58.

marriages "retain the basic characteristics of the traditional bride-price marriage and are, therefore, not of a different order".[1]

The true position is that, contrary to the assertion of Elias, "woman-to-woman" marriage was practised throughout Nigeria among communities with widely different origins and customs.[2] They have been recorded as widely practised among the Igbos;[3] Yorubas;[4] Nupes;[4] Ijaws;[5] Igalas;[6] some groups from Benin;[7] the Opobos;[8] Yagbas;[4] Akokas[4] and Gana-Ganas[4] among others.

In order to appreciate the real nature of the custom, it is necessary to examine separately the circumstances in which these marriages were usually contracted. To treat them as a single category, as many writers have done, would be misleading.

The circumstances under which this type of marriage was usually contracted may be categorised as follows:-

(i) A married woman with children may provide the dowry

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1. E.I. Nwogugu, Family Law in Nigeria, (Ibadan, Nigeria; Heineman Educational Books (Nig.) Ltd., 1974), p.56.
2. F.D. Lugard, Dual Mandate in British Tropical Africa; op.cit.,p.244.
3. Talbot, Peoples of Southern Nigeria, op.cit., pp. 431, 441; Tribes of the Niger Delta, op.cit.,pp. 93, 195-196; C.K. Meek, Law and Authority in a Nigerian Tribe, op. cit., p.275; Thomas, Anthropological Report on the Ibo-Speaking Peoples, Part IV, 1914, op.cit.,pp.83-85; Esenwa, "Marriage Customs in Asaba", op.cit., p.74; Uchendu, The Igbo of South Eastern Nigeria, op.cit., p. 50.
4. C.K. Meek, Tribes of Northern Nigeria,Vol.1, pp.209-210; O. Temple, Notes on the Tribes, Provinces, Emirates and States of the Northern Provinces of Nigeria,1922, p.324; Pearce Jervis, Of Emirs and Pagans: A View of Northern Nigeria (London, Cassell, 1963), pp.137-138.
5. Talbot, Tribes of the Niger Delta, op.cit.,pp.195-196.
6. Enwezor and Anor.v. Enwezor and Ors.[1972] Suit No. 0/146/72; unreported, Onitsha High Court.
7. Lugard, Political Memoranda, op.cit.,p.244.
8. M.D. Jeffrey, "Lobolo is Child Price", African Studies, 1951, Vol.10, No.4, pp. 145-184 at p.163.

for her husband to marry another woman[1] who, as a result of the marriage, will be her co-wife, both of them sharing a common husband. The reason for a wife providing dowry for such a purpose is that she wishes to enhance the status of her husband, since the possession of many wives was formerly a mark of considerable prestige. Indirectly, of course, she also enhances her own position, since in most cases she would be the senior wife. The addition of a new wife enhances the prestige of every wife senior to her. In addition, the wife who pays for another wife, invariably has a greater degree of control over the choice of the new wife than she might have had if the husband himself had provided the dowry. She would also have a greater degree of control over the new wife in domestic and other matters. Payment of the dowry for a new wife operates as an assertion of her economic affluence, and a contribution to the status of the husband's extended family as a whole.

(ii) A woman, married or unmarried, may provide the dowry for her son or other male relative to marry. This is usually done when the man concerned cannot afford to pay the dowry for his own marriage.[2] In some cases, especially in the case of a son, a mother may provide the dowry and marry a wife for her son whether he consents to her doing so or not.

In spite of the son's protests, in some communities, for example, Onitsha, the children begotten by such a wife for another man are legally affiliated to

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1. See Ngwobia Uka, "Growing Up in Nigerian Culture: A Pioneer Study of Physical and Behavioural Growth and Development of Nigerian Children",(Ibadan Nigeria: Ibadan University Press, 1966), p.37; C.K. Meek, Law and Authority in a Nigerian Tribe",1950, op.cit., p.275; Meek, Northern Tribes of Nigeria, op.cit., pp.209-210.

2. See the case of the Tiv lady who paid the dowry for the marriage of her junior brother, below pp.262-264. See also Meek, Law and Authority in a Nigerian Tribe, op.cit., p.203.

the son, and will be classed with his other children, if any, begotten by wives he himself married, for purposes of inheritance and representation.[1] A number of such cases were reported in Onitsha.

Categories (i) and (ii) above cannot be correctly termed "woman-to-woman" marriages. The woman providing the dowry does not contract the marriage on her own behalf, and all the marriage rites are performed in the name of the man concerned, whether husband, son or other male relatives. The payment of the dowry gives the payer a measure of moral control over the wife paid for, but legally, the woman who provides the dowry has no rights over the woman on whose behalf it is paid, or her progeny, and the latter cannot inherit from the payer, as her children. In other words, provision of the dowry creates no legal bond between the woman who provides the dowry, and the woman on whose behalf it is paid, or the latter's children.

(iii) A barren married woman may marry another woman on her own behalf.[2] For example, F H, a woman, marries W, another woman. Any children begotten by W are counted as the children of F H for inheritance and other purposes. The dowry is paid by F H and all the rites are performed by her in her own name. Different detailed rules apply to different communities, but in Isele Asaba (Igbo), for example, where F H pays for W, W is assigned to a male "friend" for the purpose of procreation, and any son begotten by W

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1. Information given by Professor J.B. Okala of Onitsha, confirmed in interviews with other Onitsha informants. Compare this account with the custom as practised by the Lovedu, see Eileen Jenson Krige, "Woman Marriage with Special Reference to the Lovedu", Africa 44, 1974, pp.11-37 at p.18; R.G. Armstrong, "Intestate Succession among the Idoma", in Studies in the Laws of Succession in Nigeria, edit. by Duncan M. Derrett, (London: Oxford University Press, 1965), p.215.

2. See Thomas, Anthropological Report of the Ibo-Speaking Peoples, Part IV, 1914, p.58, "..a childless wife purchases for herself, not for her husband, a wife whom she assigns to a "friend, usually chosen by the 'wife' herself".

inherits from F H and from F H's husband (H) if she herself is married. Under no circumstances may H have sexual relations with W, but if he dies, W may have sexual relations with his sons if they are old enough. If F H marries the eldest son of H, (who of course must not be her own son) after H's death, W remains with her 'friend'.[1]

In some societies, W is given to the husband of F H for the purpose of bearing children. Any children begotten by W are counted as the children of H (F H's husband), and may therefore inherit from F H and from H, their legal father, whether he is also their natural father or not. W is known as the wife of F H and not a co-wife as in (i) above, and F H has full legal control over W. Instead of a stranger her husband is used as the genitor of W's children.[2] This was the position in Meribe v. Egwu,[3] where the distinction was drawn, but it is respectfully submitted, not correctly interpreted by the Nigerian Supreme Court.

The reason why a barren woman who can afford to do so would marry another woman is not far to seek. The position of a childless woman in the traditional Nigerian society was not an enviable one. Basden says:

> A childless woman is regarded as a sort of monstrosity; indeed, it is not unknown that, when such a woman dies, in order to express the contempt in which she is held, her abdomen is slit across prior to her burial. She has failed to fulfil her function in life, and this mutilation of the corpse is the token of her failure; her name is blotted out for ever".[4]

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1. Thomas, Anthropological Report of the Ibo-Speaking Peoples, op.cit., Part IV, p.83.
2. Ibid., p.84.
3. [1976] 3. S.C.23.
4. Basden, Niger Ibos, op.cit., p.213; see also Arthur G. Leonard, The Lower Niger and its Tribes, (London: Mac Millan and Co., Ltd. 1906), pp.215 and 216; Talbot, Tribes of the Niger Delta, op.cit., p.191; Ngwobia Uka, Growing Up in Nigerian Culture, op.cit.,pp.36-37; Bowen, Central Africa, op.cit., p.305; "agan, barren, is a word which the most malignant and enraged person scarcely ever presumes to address to a childless woman", among the Yoruba.

He notes that this is probably true of all African tribes. A barren woman who begets children by marrying another woman thereby avoids the social censure of sterility, since these children are affiliated to her. She also secures the performance of her burial rites. Children have a sacred duty to perform these important rites for their deceased parents. In addition sustenance and comfort in her old age is guaranteed.

Last, but not least, is the benefit she gains should her husband predecease her. In all Nigerian societies, women do not inherit property from their deceased intestate husbands, under customary law, except through children, or in some societies, through sons only. A wife who has no children may derive no benefit from her husband's property when he dies. A barren but wealthy woman compensated for her sterility by her economic fecundity, - paying for a wife of her own through whom she produces children, and thus gains rights of inheritance and other benefits.[1]

(iv) A single woman may marry another woman on her own behalf.[2] She gives the woman thus married to a man to beget children who are legally affiliated to her. Although the large majority of women in traditional society was married, some women were not, for a variety of reasons. Society was less tolerant of children begotten by single women than it is today.[3] Woman-to-woman marriage was a possible method of intruding into the exclusive male domain.

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1. See Talbot, Tribes of the Niger Delta, op.cit.,pp.195-196.

2. Meek, Law and Authority, op.cit., p.275; Thomas, Anthropological Report of the Ibo-Speaking Peoples, Part IV, 1914, op.cit., p.83; Meek, Northern Tribes of Nigeria, op.cit.,p.210; Iweze v. Okacha [1967-1968] M.S.N.L.R. 64.

3. Any children begotten by a single woman legally belong to the woman's father in most Nigerian societies. Cf. the position in England where until 1883 women could not claim custody of their illegitimate children either at Common law or Equity. The position was changed in 1883 in R.V. Nash, [1883] 10, Q.B.D. 454, C.A., followed

footnote continued.....

A single woman of wealth and strength of character could, by this method, establish a compound of her own, and may even be a polygamist.[1] In Orakwue v. Enemali,[2] the founder of the compound over which the claim was brought had been a woman, one Mbem, who founded the Mbem family of Onitsha. She had never been married to any man, and had no issues of her own. She was alleged to have married three wives who produced many children for her. The woman in Nwezor v. Nwezor[3] also had several wives, although she had a husband as well.

In Iweze v. Okacha,[4] expert evidence was given which showed that according to Asaba customary law it was possible for an unmarried woman who had no issues to marry another woman. Issues produced by this other woman took the name of, and inherited from the woman who paid the dowry on behalf of their mother. The marriage need not be contracted in the name of a man. The statement by Obi and Nwogugu that the marriage must always be contracted in the name of a man does not apply in all communities in Nigeria, nor even among all Igbo communities.[5]

The recent case of Meribe v. Egwu[6] shows the

Footnote 3 continued.... by Barnado v. McHugh [1891] A.C. 388 and finally by Statute, see Children Act, 1975, Section 85 (7).

1. See Lugard, Political Memoranda, op.cit., p.245, where it is reported that one woman had 19 wives for whom she paid dowry ranging from 15/ to 25/.
2. [1964]Suit No.O/37/64, unreported, High Court Onitsha,1964.
3. [1972] Suit No.O/146/72,unreported,High Court Onitsha,1972.
4. [1967-1968] M.S.N.L.R.64.
5. See Thomas, Anthropological Report of the Ibo-Speaking Peoples, Part IV, 1914, p.83; Meek, Law and Authority in a Nigeria Tribe, op.cit., pp.275-276; Meek, Northern Tribes of Nigeria, op.cit., p.210; Iweze v. Okacha [1967-1968] M.S.N.L.R. 64.
6. [1976] 3 S.C.23.

attitude of the Nigerian Supreme Court towards "woman-to-woman" marriage.[1] In this case, Nwanyiokoli, one of the wives of Chief Cheghekwu, because she had no children, married her niece, Nwanyiocha, and gave her to her husband for procreation. The niece had children for Chief Cheghekwu, one of whom was the plaintiff in the case, which involved inheritance to land owned by Nwanyiokoli. Nwanyiokoli had brought the plaintiff up as her son and he and his natural mother, Nwanyiocha, lived with her. When Nwanyiokoli died, the plaintiff claimed that he performed the burial ceremony, and inherited her property, including the disputed land. He had farmed on this land from the time of Nwanyiokoli's death in 1937, until 1971, when the defendants trespassed on it.

The defendants were the children of Meribe, eldest son of Chief Cheghekwu by another wife. When his father died, Meribe had "inherited" Nwanyiokoli under native law and custom, and they had lived as man and wife. The defendants claimed that when Nwanyiokoli died, it was their father Meribe who had performed the burial rites, and inherited her properties, including the disputed land, and not the plaintiff. On Meribe's death, they had inherited the land, as his children.

Chief J.O. Ekwuruke gave evidence, which was accepted by the court, as follows:-

> "It is the custom in our place [Umuahia] that if a woman has no issue, she can marry another woman for her husband; any issue from the said woman would be regarded as an issue from the woman who married her for the purpose of representation in respect of estates and inheritance".[2]

The trial Judge, Aniagolu, J., was satisfied that Nwanyiokoli married Nwanyiocha for Chief Cheghekwu, and that she treated the plaintiff as her son. He held that the

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1. For a criticism of this case see, C.O. Akpamgbo, "A Woman-to-Woman Marriage and the Repugnancy Clause," African Law Studies, 1977, No. 14, p.87.

2. Meribe v. Egwu [1976] 3 S.C.23, at p.24.

facts disclosed in the evidence were in accord with the native law and custom of the area. He said that it was evident that "Nwanyiokoli did not marry Nwanyiocha for herself - a fact naturally impossible - but for her husband". The learned Judge continued:

> "The word marriage in that context is merely colloquial, the proper thing to say being that she procured Nwanyiocha for Chief Cheghekwu to marry her".

The Court found no suggestion of anything immoral in the transaction, and entered judgment for the plaintiff, thereby holding that the marriage was legally valid.

The defendants appealed to the Supreme Court which upheld the judgment given in the lower court. The Supreme Court, in the course of its own judgment, said:

> "In every system of jurisprudence known to us one of the essential requirements for a valid marriage is that it must be the union of a man and a woman thereby creating the status of husband and wife. Indeed the law governing any decent society should abhor and express its indignation of a "woman-to-woman" marriage, and where there is proof that a custom permits such an association the custom must be regarded as repugnant by virtue of the proviso to section 14(3) of the Evidence Act and ought not to be upheld by the court".[1]

Having drawn a distinction between cases where a woman marries another woman for her husband, and where she marries for herself, the Courts found in the instant case that Nwanyiokoli married her niece for her husband, that is, she paid the dowry and selected the girl for her husband to marry. Nevertheless, the Courts gave inheritance rights in Nwanyiokoli's estate to the children of that marriage, thereby implying that children acquire inheritance rights in the property of whoever pays the dowry for the marriage of their mother. This principle, if followed to its logical conclusion would vest in the issues of a marriage inheritance rights to the property

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1. Meribe v. Egwu [1976] 3 S.C. 23 at p.32-33.

of a mother, sister, father, or even a friend who provided the dowry for the marriage.

It is respectfully submitted that this does not correctly represent the customary law of the Igbos, nor of the other communities in Nigeria. Payment of dowry simpliciter, confers no legal rights on the payer. Legal rights are vested in the person in whose name the marriage rites are performed. If the marriage rites were performed in the name of Nwanyiokoli's husband, then the woman married would be Nwanyiokoli's co-wife, and issues of that marriage should not inherit from Nwanyiokoli, since children do not inherit from the wives of their fathers, who are not their own mothers. If, however, the marriage rites were carried out in the name of Nwanyiokoli, then it was she who married the woman, a fact not "impossible" as the courts held. Sexual intercourse is merely one of the functions of marriage. Incapacity to have sexual intercourse does not render a marriage void.[1] Many marriages are contracted with the express intention that the parties should have no sexual intercourse with each other. Marriage for companship has long been known to various systems of law.[2] The courts, by holding that the marriage between Nwanyiokoli and her niece was "impossible", was confounding one of the incidents of marriage - sexual intercourse - with the marriage itself. This exposes the danger inherent in adopting a functionalist definition of marriage.[3]

With the introduction of more stringent immigration laws in many countries, for example, England,

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1. Under the Nigerian Matrimonial Causes Decree, 1970 incapacity to consummate a marriage makes the marriage voidable by either party, S.15(1)(a); see also the English Matrimonial Causes Act, 1973, s.12(a). For the distinction between void and voidable marriages, see De Renville v. De Renville [1948] 1 All E.R.56,60; C.A. [1948] P.100,111. For the history of the distinction, see Bromley, Family Law, op.cit., pp.69-72; See also S.A. Adesanya, Laws of Matrimonial Causes (Ibadan, Nigeria: Ibadan University Press, 1973, pp.139 et al.
2. See W.V. Horton Rogers, "Sham Marriages", 4 Family Law, 1974, pp.4-7 at p.14; and obiter dicta in United States v. Rubinstein [1945] 151 F. 2d. 915.
3. For criticisms of the functionalist definition of marriage, see P.G. Riviere, "Marriage: A reassessment",

Footnote continued.....

marriages of convenience have become commonplace,[1] and are recognized as valid legal marriages by the English Courts.[2]

Contrary to the sentiment expressed by the Supreme Court, there is nothing intrinsically wrong or immoral which "any decent society should abhor or express its indignation" at, with a barren woman, in accordance with the laws of the society to which she belongs, marrying another woman to raise issues for her by a male genitor. Sterile or impotent men marry women, and, with the latter's consent, assign them to other men for the purpose of producing heirs. This is common practice in all parts of Nigeria,[3] and is not unknown in other parts of the world.[4] In some cases, the husband pays for the services rendered by the male genitor, as was done in the recent German case where the

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Footnote 3 continued.... in Rethinking Kinship and Marriage, edit. by Rodney Needham (London: Tavistock Publications 1971), p.59; Krige, "Woman Marriage...", op.cit.,pp.30-34.

1. Advertisements offering marriage "for citizenship" for very substantial considerations frequently appear in the English press. Private Eye, 16 Nov. 1973, contains no less than 20 "offers of citizenship" at prices up to £1,000.

2. See for example Silver v. Silver [1955] 2 All E.R. 614; see also Kelly v. Kelly [1932]49 T.L.R.99; H v.H [1953] 2 All E.R. 1229 at 1234. See also, "Horton Rogers, "Sham Marriages", 4 Family Law 1974, p.4, and cases cited there. In Silver v. Silver,the courts refused to grant a decree of nullity of marriage and held that the marriage was valid as there was no element of duress and the parties had intended to become man and wife. The wife, a German subject, had gone through a form of marriage with the step-brother of her lover, an Englishman in order to enable her to obtain permission to stay in England. She wanted to live in England with her lover but he was already married, hence the sham arrangements. The parties never cohabited and saw each other only twice during the twenty-nine years following the marriage. Cf.United States v. Rubinstein, 151 F.2d. 915 [1945].

3. The Customary Law Manual, op.cit., pp.272-274; Meek, Law and Authority , op.cit.,p.276; Basden, Niger Ibos, pp.226, 238; Lugard, Political Memoranda, op.cit., p.244.

4. Henry Sumner Maine, Dissertations on Early Law and Custom, (London: John Murray, 1883), pp.98 et al; Vinogradoff, Historical Jurisprudence, Vol.I, 1920, pp.237-238.

genitor was paid £1,200.[1]

The use of the word 'procure' by the Courts is an unfortunate one as a procurer is a man or woman who obtains women for the gratification of another's lust,[2] but there was no suggestion of immorality in the evidence before the Courts.

Farran,[3] writing on the matrimonial laws of the Sudan, where "woman-to-woman" marriage has a wide distribution, called for great sympathy from the judges. He advocated that judges try to understand the purpose, and the effect in customary law of these unions before ruling on their validity, rather than just rejecting them out of hand as 'barbarous' and 'absurd.' He thought it probable that this would be the attitude of an uninstructed European judge. It is unfortunate that this has been the attitude of brilliant sons of Nigerian soil.

The Judges were no doubt influenced by the recent decisions of the English courts in cases involving marriages between members of the same sex,[4] and the current prevalence of homosexuality and lesbianism in Europe and America.[5]

Information collected during fieldwork about the nature and practice of "woman-to-woman" marriage in Nigeria, revealed no tint of sexual relations between the women involved. There is opportunity for abuse inherent

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1. See "News of the World"; 19 Feb. 1978, p.11; The genitor employed by the husband had two children of his own. After six months frequent trials proved unsuccessful, the genitor was taken to the doctor where he too was pronounced sterile. His wife later admitted that she had, unknown to him secured the services of a genitor who was the natural father of the two children of the marriage; see also Customary Law Manual, 1977, op.cit., pp.273-274.
2. Concise Oxford Dictionary, 6th edition.
3. Farran, Matrimonial Laws of the Sudan, op.cit.,pp.80-81.
4. See e.g. Talbot v. Talbot [1967] 111, Sol.Journal, 213; Corbett v. Corbett (otherwise Astley) [1970] 2 All E.R. 33 which involved a sex change; see also A.R. David Green, "Transexualism and Marriage", The New Law Journal 1970, Vol. 120, p.210.
5. Under the English Matrimonial Causes Act, 1973, Section 11 (c), a marriage is void if the parties are not respectively male and female. There is no similar provision under the Nigerian Matrimonial Causes Decree,1970.

in the system, and this was referred to by Lugard,[1] the former Governor-General of Nigeria, who described women who marry young girls as "keepers of brothels". But as Jeffreys aptly points out, "Brothels are most highly evolved under European culture, they form no part of African indigenous culture".[2]

Of the fifteen case histories collected during field work which involved "woman-to-woman" marriages, only one had a tinge of misuse, and this was done by a man who used the legal fiction of the institution to solve his marital problems.[3]

The custom as practised by the traditional society was no more than a legal fiction. Maine reminds us that ancient family law has long been entangled with such legal fictions, and points out the fact that "familiarity with Adoption during such a length of History, blinds us to the fact that it is one of the most violent of fictions".[4] Fictions of affiliation of children are "startling to modern sentiments but they seemed perhaps simpler and more natural to ancient thought than the admission of a mere stranger to the family".[5]

(II) 'Big-dowry' and 'small-dowry' marriage

There are some communities in Nigeria, mainly in the Southern States, where there are two levels of dowry payable with reference to the contract of marriage.

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1. Lugard, Political Memoranda, op.cit., p.244.
2. Jeffreys, "Lobolo is Child-Price", op.cit., p. 164.
3. Case file MOH/SWD/ONZ/12S 264, Social Welfare Office, Onitsha. His wife, married under the Marriage Act, had no children. She threatened to prosecute him for bigamy if he "married" another wife under customary law, so he married a wife in his dead mother's name, with whom he lived as man and wife, and who got children for him. Under customary law these children would be affiliated to him, as the mother would be taken as having married the woman for him.
4. Maine, Dissertations, op.cit., p.96.
5. Maine, Ibid., p. 98.

These marriages are referred to by various local terms such as Iya and Igwa, among the Kalabari Ijaw,[1] Iya and egwa among the Okrikan Ijaw,[2] and Amoya and isomi of the Northern Edo-speaking peoples.[3] Writers have adopted the popular (but by no means accurate) terms "big-dowry" and and "small-dowry" to describe these marriages, and this nomenclature will be used throughout this thesis to designate these types of marriages.

The essential difference, from a legal point of view, between these two kinds of marriages is that in a "big dowry" marriage, a bigger dowry is paid, and the wife is completely incorporated into her husband's family. Her husband acquires full rights in uxorem (sexual, domestic and other connubial rights), and rights in genetricem (rights of ownership of her children), which may be transmitted to other members of his family after his death, provided the dowry is not repaid.[4] Williamson notes that among the Okrika Ijaw, a "big dowry" marriage is relatively uncommon, and is regarded as a solemn tying together of the two families involved.[5] In Solomon v. Gbobo[6] it was stated that

> "Under the Okrika customary law an 'Iya' marriage could be dissolved at will by the husband by sending the wife back to her parents. The woman was then free to remarry and any children of the

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1. Eastern Nigeria: Report: Bride Price Committee, 1954, p.30.
2. Talbot, Tribes of the Niger Delta, op.cit., p. 193; Talbot, Peoples of Southern Nigeria, op.cit., Vol.III, p.437.
3. Bradbury and Lloyd, The Benin Kingdom, op.cit., p.108; S.O. Imoagene, "The Marriage System of the Weppa-Wano (Mid-Western Nigeria)" African Notes, 1970, Vol.6, No.1, p.12; N.W. Thomas, Anthropological Report on the Edo-Speaking Peoples of Nigeria, Part I(London: Harris and Sons, 1910), p.47.
4. For a good description of these marriages see, Report of Bride Price Committee, 1954, op.cit., pp.30-37; see also Kay Williamson "Changes in the Marriage System of the Okrika Ijo", 53 Africa, 1962; Thomas, Anthropological Report of the Edo-Speaking Peoples, op.cit., p. 47.
5. Williamson, op.cit. p.55.
6. [1974] 4 E.C.S.L.R. 457.

> subsequent marriage belonged to the new husband. Similarly, the wife could call the husband before the chiefs and have them work out how much was to be paid to him by way of refunding the bride price and all other expenses, including the 'Ikpo' and 'Okuru' cloths. If the husband accepted that refund, the marriage was at an end but if he refused to accept the refund, the marriage continued to subsist and there was nothing the woman could do to get free from it and any children she had by her new husband were regarded as the children of the former husband and were treated as bastards".[1]

In the 'small dowry' marriage a smaller sum is paid,[2] but the wife does not become a full member of her husband's family. Her husband's rights in uxorem are limited, and in some communities, she may not live with, or cook, for him. He acquires no rights to her children begotten by him. On the death of the husband of a small dowry marriage, his rights over the wife are automatically terminated; she is free to return to her own family, and is not inherited by any member of her deceased husband's family.[3] In some communities, this form of marriage is compulsory for all the daughters of a family, except the first daughter.[4] A big dowry marriage, among some communities, for example, the Kalabari, is considered the highest honour conferable on a woman, and usually only free-born women could be married in this manner.[5]

Further differences between the two types of

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1. Solomon v. Gbobo [1974] 4 E.C.S.L.R. 457-459.
2. The Bride Price Committee reports that among Okrika Ijaw, there is no dowry payment and no ceremony in a small dowry (Igwa) marriage. An expenditure of £5 to £10 is involved and the two families merely gather and drink. A big dowry marriage ranges from £60 - £80; cf. the position among Kalabari Ijaw where the total cost of a big dowry marriage ranges from £300-£400 or even more, while the total cost of the small dowry marriage is about £25 - see Bride Price Committee Report, op.cit., p. 30-34.
3. Bride Price Committee Report, p. 34.
4. Imoagene, "The Marriage System of the Weppa-Wano", op.cit., p.12.
5. See Talbot - Tribes of the Niger Delta, op.cit., p. 191.

marriages will be noted and exemplified in the appropriate context in future chapters.

(III) "Marriage by succession" (widow-inheritance)

There are two practices in regard to widows found in many legal systems in all parts of the world, both sometimes mistakenly designated by the generic term levirate marriage. Radcliffe-Brown insists that a distinction must be made between levirate marriage and what many writers refer to as "widow inheritance".[1]

In the case of levirate marriage as practised by the biblical Hebrews and many other societies,[2] on the death of the husband, the widow is taken over by his brother or other male relative whose duty it is to raise children in the name of the deceased. Children born of this union are affiliated to the deceased husband for purposes of inheritance, succession and representation. Levirate marriage was formerly practised by the Yorubas,[3] and is still practised by the Tivs.[4]

In the different situation of the so-called "widow-inheritance", the widow remarries to a member of her deceased husband's family, but any children of this subsequent marriage are affiliated to their natural father, the widow's new husband, and not to her deceased husband. Although some writers do refer to this subsequent marriage as widow-inheritance, it is respectfully

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1. Radcliffe-Brown and Forde, African Systems of Kinship and Marriage, op.cit., p.64.
2. Deuteronomy, Chapter 25, verses 5-10; Ruth, Chapters 1 - 4; See Also Max Gluckman, Kinship and Marriage, op.cit.,p. 183, who describes the practice of levirate among the Nuer and Zulu.
3. A.B. Ellis, The Yoruba-Speaking Peoples of the Slave Coast of West Africa, (London: Chapman Hall Ltd., 1894) p. 185
4. Akiga, Akiga's Story, op.cit., pp.316-319; see further below, Chapter VIII.

submitted that this term is derogatory of women's status and is also scientifically incorrect. Women are not items of property, and should not be classified as such. This argument will be pursued in future chapters.[1] The term "widow-inheritance" as far as possible, will be avoided in this thesis. The appellation "marriage by succession", or "succession marriage" will be employed in its stead.

(IV) "Marriage by exchange"[2]

Meek records at least twenty-one tribes including Idoma and Tiv who practised exchange marriage in the Northern parts of Nigeria.

It is a form of marriage whereby a lineage distributes its female members as wards to its male members, referred to as guardians. Usually a guardian exchanged his ward (ingol), ideally his immediate younger sister (Ityongo), with a man from another lineage, who in return gives him his own ward, again ideally the man's younger sister, as his wife. The essence of the idea is that the wife who is introduced into a lineage takes the place in a very real sense, of the daughter of the family for whom she had been exchanged. She bears children for the lineage by proxy, and the exchange is not complete until children are born. If, at the end of the child-bearing period, both women have children of the same number and sex, then the matter rests there. If only one of the women bears

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1. See further below, Chapters VIII and XIII.
2. For a full description of exchange marriage as practised in different parts of the Northern States of Nigeria, see Akiga, Akiga's Story, op.cit., Bohannan and Bohannan, The Tiv of Central Nigeria, op.cit., pp.69-75; C.K. Meek, The Northern Tribes of Nigeria, op.cit., 204-205; C.K. Meek, A Sudanese Kingdom: An Ethnographical Study of the Jukun-Speaking Peoples of Nigeria, (London: Kegan Paul, Trench, Trubner and Co. Ltd., 1931), pp.373-376; Abraham, The Tiv People, op. cit., pp.138-147; R.M. Downes, The Tiv Tribe, (Kaduna: Nigeria, Government Printer, 1933), pp. 16-19; and see generally, Westermarck, The History of Human Marriage, op.cit., Vol. II, p.358 et.al., for exchange marriage in all parts of the world.

children, then her lineage could annul the contract, and demand her return, or another woman to take the place of the barren one.

The system, although simple in theory, in actual fact resulted in an uneven and unstable mixture of features which varied from one lineage to the other.[1]

Marriage by exchange in the form described above seems to be entirely unknown in the Southern States of Nigeria. Talbot records that marriage by exchange is common among the Igbos and other eastern groups,[2] but he describes the system as one where two men will agree that each shall take as wife the daughter of the other, thus saving dowry expenses. Under this system wives were also exchanged.[3]

Spörndli, on the other hand, describes among the Igbo, a system called inwe-nwunye n'oghagha (marriage in exchange), in which two female children are handed over to the bride's family by the future husband in exchange for his wife. He only came across one such case and limits the practice to four places south of Owerri.[4] Queries to various sources during field work as to the practice of exchange marriage among the Igbos, or other communities in the Southern States, elicited negative replies. Informants, however, did not rule out the possibility of occasional private arrangements between two individuals, be they fathers or husbands, or even families, such as these reported by Talbot.[5]

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1. Bohannan and Bohannan, op.cit., p.69.
2. Talbot, The Peoples of Southern Nigeria, op.cit., Vol. III, p. 425.
3. Talbot, Ibid., pp.440-441; see also Report: Bride Price Committee, (Enugu, Nigeria, Government Printer, 1954), p. 35, Westermarck, History of Marriage, op.cit., Vol. II, pp. 230-234.
4. J. Spörndli, "Marriage Customs Among the Ibos", Anthropos, 1942-1945, Vol.37-40, pp.113-121 at p.119; see Bride Price Committee Report, 1954, op.cit., p.35, which states that in Brass Division, two men exchange sisters, instead of paying dowry; Meek, Law and Authority, op. cit., pp.265-266.
5. See Uchendu, The Igbo of South Eastern Nigeria, op.cit., p.51, who describes a case of private exchange of wives; cf. Wife-swapping in Europe and America.

It is evident that the system described by the two authors, as practised by the Igbos, is different from the system briefly described above, which is found in the Northern States where it has a fairly wide distribution. As noted above, Meek records at least twenty-one tribes including Idoma and Tiv who practise exchange marriage.[1] This type of marriage, lumped by Elias with the systems described as practised by the Igbos, and referred to by him as 'revolting' and 'untenable',[2] was, among the Tiv, the basic form of marriage. Akiga says:

> "...with the Tiv the exchange system cannot be considered merely as a better or worse way of getting a wife. It is, or has been, an institution of paramount importance, and lies at the base of the whole present tribal organization. Moreover, it is bound up with the strongest of supernatural sanctions; for although the spiritual life of the tribe has been severely shaken by events of recent years, the orthodox belief, still held by the old men, is that the fertility of the crops and of the women - in fact, the very existence of the tribe - is dependent on exchange marriage and the rites which are associated with it".[3]

The Bohannans, who conducted intensive investigations of Tiv society, note that exchange marriage

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1. Meek, Northern Tribes of Nigeria, op.cit.,p.204; Akiga's Story op.cit., p.291; C.K. Meek, "Marriage by Exchange in Nigeria: A Disappearing Institution", Africa Vol.IX 1936, p.64-74 at p.65. For general distribution of exchange marriage, see O. Temple, "Notes on the Tribes...",op.cit.,1922.

2. T.O. Elias, The Nigerian Legal System, 1963, op.cit., p.291; The writer states that it is practised in a few isolated pockets in rural places. In 1963 the Tivs had a population of 1,393,649 and the Idomas, 485,562; For a similar opinion see Akinola Aguda, Select Law Lectures, (Nigeria: Associated Publishers, 1971), p.68.

3. Akiga's Story, op.cit.,p.100. Compare the statement made by Meek with reference to exchange marriage among the Igbos, "Two men may agree to exchange their sisters (or cousins or daughters) as brides; though, when this is done, it is usual also to exchange some small amount of material property, in order to formalize the marriage, as it is felt that if gifts and money are not also exchanged the relationship set up would be one of concubinage rather than of marriage". - Meek, Law and Authority.... , op.cit. p.265.

among the Tiv is based on the idea that the "only commodity decently exchangeable for the fertility of one woman was that of another".[1]

The system was admittedly complicated, and gave rise to many legal disputes. In addition, it was abused in certain areas, but writers generally agree that, despite its perils, marriage by exchange was a more stable form of marriage than marriage by payment of dowry which remained the only permissible form after the Government declared marriage by exchange illegal in 1927.[2] Marriage by payment of dowry[3] formerly existed side by side with exchange marriage, but it was not considered important. Marriage by payment of dowry contains none of the elements of compulsion and permancy inherent in the exchange system of marriage.[4] The greatest value of the exchange system was that "it gave a poor man an equal chance with the rich".[5]

The abolition of marriage by exchange has created hardships for the less wealthy in Tiv society. In common with other parts of Nigeria, the level of dowry now payable in Tivland has soared considerably, and ranks amongst the highest in the country.

An informant, a Tiv lady,[6] said she was forced

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1. Paul Bohannan, Justice and Judgment Among the Tiv, (London: Oxford University Press, 1968), p.72; See further, Paul and Laura Bohannan, "Tiv Economy", (London: Longmans, 1968), p.232. In Kem (dowry marriage) only rights in uxorem were acquired, to affiliate children, separate payment had to be made.
2. Marriage by exchange was abolished in 1927 among the Tiv, and among other Northern Tribes in 1921, see Meek, "Marriage by Exchange", op.cit., p.64.
3. Referred to as "kem" marriage among the Tiv.
4. Abraham, The Tiv People, op.cit., p.147.
5. Meek, Marriage by Exchange, op.cit., p.73.
6. Personal Interview with Mrs. C.O. Social Welfare Officer, held at The Catholic Guest House Ibadan, on 12 August, 1977, where she was attending a Conference.

to pay ₦1,500 in order to get a wife for her brother who could not afford such a large sum. In addition to the money, she also had to make gifts of clothes, jewellery and other items to the bride and her parents. She stated that that was not the end of the payments as "among the Tiv one never stops paying dowry". She expressed her joy, however, at the news recently received that the wife whom she had sent to her brother, a student in England, had delivered a baby boy, so that the dowry paid had not been "wasted" as it might have been had the wife proved sterile. Her story is interesting and is best recorded in her own words:

> "My mother was the second of the six wives of my father, and had not been married by exchange. We all lived in the very large compound of my paternal grandfather who was a big Chief with about twenty wives, the first one of whom only had been married by exchange. Most of the other wives had been brought to him for marriage by their people, because of his prosperous compound.
>
> My mother had no living son. The only son she had died. I never saw my mother smile. I remember her crying for that son years after he had died. She would just sit down and cry and cry. One day when I was about six years old I said to her, "Ma, why do you always cry?" She said, "It is because I have no child. Your father's wives laugh at me and tease me with scorn because I have no child". I asked her, "You say you have no child, am I not your child, is Wante (my sister) not your child, why do you say you have no child?" "Yes," she answered "you are my child, and it is for you and your sister that I am crying. I myself had no brother, and I have suffered all my life because of this. I do not want you to suffer as I have done". Now crying myself I said to her "Ma don't cry, or I will die too. I will kill myself. When I grow up I will buy many things for you if you do not cry".

From that day her mother stopped crying, at least in her presence. Ironically, not long after, she was noticed by a missionary who thought she was a bright little girl, and if left in the old Chief's compound, would "go the way of all the other women". She was taken to the mission house where she was trained and educated, with the result that of all her father's numerous children, she was

the only one to occupy a prominent position. She could afford to buy all kinds of things for her mother, whom she described as being "happy now", and the envy of all the other wives, who had many boys".

This story is related for its pathos, bringing out in bold relief the importance of male children in the eyes of the Tiv (and in many other societies), even though because of their peculiar marriage system, girls were essential and at a high premium.

"There is nothing that the Tiv esteem so highly as Woman", says Akiga, whose history and institution of his people was translated and annotated by East in 1939.[1] Yet her mother would have gladly exchanged her two daughters for a son. It also portrays the agonising humiliation and misery a woman who had no children, or more particularly no male child, could suffer in a polygynous household. It belies the assertion of the protagonists of polygyny that it provided an alternative to a childless woman.[1] It may do so in a small minority of cases, but usually it did the opposite.

D. Marriage by capture

The capture of women in traditional society was a popular method of obtaining wives in all parts of Nigeria.[2] Women captured in tribal wars, or when villages were plundered for the purpose of obtaining slaves during the slave trade, were not all killed, or sold as their male counterparts generally were. Many of the women were retained and shared to the victors in recognition of their valour, and the resultant proportional imbalance between

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1. Akiga, Akiga's Story, op.cit., p.313.
2. See Ward, "Marriage Among the Yorubas", 1937, op.cit., pp.15-18; Fadipe, The Sociology of the Yoruba, 1970, op.cit., p.92; Donald M. McFarlan, Calabar: The Church of Scotland Mission founded 1876 (London: Thomas Nelson and Sons Ltd., 1957) p.90; C.K. Meek, Northern Tribes of Nigeria, 1925, op.cit., pp.287-293 esp. at p.293; Begho, "Law and Culture....",1971, op.cit., p.55; the Itsekiri man would not hesitate to marry beautiful women captured by him in battle.

the sexes, has been attributed as a potent factor contributing to the practice of polygyny in certain communities.[1]

These captured women, however, were generally treated as slaves, and, if married by freemen, were not referred to as wives, but as concubines,[2] since in most cases the usual formalities prevailing in the society were either absent or considerably reduced in the marriage of slaves.[3]

Mead[4] gives a vivid description of the treatment accorded to the captured victims of tribal wars, among the natives of the island of Manus in the Admirality Groups, an isolated community in New Guinea, until recently untouched by missionaries or foreign trade. The victim was treated as a prostitute:

> "...the unfortunate captive was raped by every man in the village, young and old. The men kept her in the boys' house; her particular captor collected tribute from the others; sometimes he even took her on a money-making tour through friendly villages. The men dressed her in finery to outrage further the women, who disagreed with the spirits about the innocuousness of the whole proceeding. Everywhere the men went, they took their unhappy captive with them, afraid to leave her exposed to the vengeful hatred of the women. But the men did nothing to ameliorate her lot; they showed her neither kindness nor consideration...Upon her the men wreaked their hatred of women aroused by the frigidity of their wives and the economic exactions imposed by matrimony. Upon her single person the young men savagely expended all the pent-up energy of the

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1. See R.O. Ekundare, Marriage and Divorce Under Yoruba Customary Law, (Ife, Nigeria: University of Ife Press, 1969), pp.8-9, for the view that one important factor which could have influenced the Yorubas to adopt polygamy, was the slave trade.

2. Downes, The Tiv Tribe, 1937, op.cit.,p. 19; Begho, Law and Culture....", 1971, p.55; the only legal form of marriage ta emo tsi was never done in the marriage of a slave-woman.

3. See Talbot, Tribes of the Niger Delta,1932, op.cit., pp.189-191; Ward, Marriage Among the Yorubas, op.cit., p.42.

4. Margaret Mead, Growing up in New Guinea: A Study of Adolescence and Sex in Primitive Societies, 1930, (Penguin Books, 1975), pp. 147-148.

> youth which was denied the joys of courtship and flirtation. Worn and old in a year or two, or displaced by a new prostitute, she was permitted to go back to her home where she usually died soon after. Sometimes she died in captivity".[1]

Marriage by capture as a normal mode of contracting the conjugal tie, also exists among some groups in the Northern States,[2] and to a lesser extent in the south.[3]

This type of marriage previously existed in various parts of the world including Rome, Russia, Japan, Australia, India and Arabia before the advent of Muhammed.[4] It has also been reported as practised by many Indo-European peoples. Pollock and Maitland wrote:

> "It is said with some show of truth that in the earliest Teutonic laws, we may see many traces of "marriage by capture". The "Rape marriage", if such we may call it, is a punishable offence; but still it is a marriage".[5]

In various parts of Africa, wives were also married by capture.[6]

Westermarck disagrees with the suggestion that marriage by purchase arose out of marriage by capture, and that abduction without parental consent was the primary form; then there came the offering of compensation to

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1. Ibid., pp.147-148.
2. Meek, Northern Tribes of Nigeria, op.cit., pp.205-209.
3. Ward, Marriage Among the Yorubas, op.cit., pp.15-17.
4. Westermarck, A Short History of Marriage, op.cit., pp.110-113; William Blackstone, Commentaries on the Laws of England, 10th edit. (London: Clarendon Press,) Vol. IV, p.208. cf. Deuteronomy, Chapters 20, V.14; 21, Verses 10-14.
5. Pollock and Maitland, The History of English Law, op. cit., Vol.II, p.364; see also Westermarck, A Short History of Marriage, p.113.
6. See H.J. Simons, African Women: Their Legal status in South Africa, (London: Hurst and Co., 1968), p.117-118; Cf. R.G. Abrahams, "The Peoples of Greater Unyamwezi", Tanzania, (London: International African Institute, 1967), p.75; Such marriages are in the form of an elopement among some communities in Tanzania. See also Yambeze v. Gondamidzi,[1912] S.R.L.R.103. Held, a woman's marriage to a man who had captured her in warfare would be recognized as binding as other native

Footnote continued.....

escape vengeance of the woman's clan, which grew eventually into the making of presents beforehand. He points out in contradiction of this assertion, that marriage by consideration prevails among a large number of peoples who have never been known to be in the habit of capturing wives, and that among no people is marriage by capture known to have been the usual or normal mode of contracting a marriage.[1]

In Nigeria, in most cases, marriage by capture is intertwined with elopement, since the seizure is usually effected with the consent of the bride, and often with the cognizance, if not acquiescence of her parents, especially her mother. The method is adopted when the young couple would encounter difficulties in obtaining formal consent to their marriage, for example, if they belong to different tribes, or where the man, being too poor to pay the dowry, the couple are forced to resort to subterfuge to accomplish their purpose, and capture is simulated.[2] Freedom from obligation to pay the usual dowry was the main reason why the retention of marriage by capture was advocated by the young people among the Tiv, when marriage by exchange was declared illegal.[3]

In some societies, marriage by capture is not regarded as legally valid, unless some kind of payment is made after the event. In the case of the Tiv, the marriage is only considered valid when a leg of mutton is accepted by the bride's family from the bridegroom.[4]

Footnote 6 continued..... marriages of the time, if it took place before British laws came into force in Rhodesia.

1. Westermarck, op.cit., p.113.
2. Hermon Hodge, Gazetteer of Ilorin Province, (London: George Allen and Unwin Ltd., 1929), pp.43-44; de St. Croix, The Fulani of Northern Nigeria, op.cit., p.41, for the procedure among the Fulani of Northern Nigeria.
3. Akiga, Akiga's Story, op.cit., p.166; Bohannan and Bohannan, op.cit., p.71.
4. Meek, The Northern Tribes of Nigeria, op.cit., p.207, and generally, pp. 205-208.

In Ibusa (West Niger Ibos), a form of marriage by capture, Ijide Nwanye, still exists. The boy and girl agree to marry, but because of the inability of the boy to pay the requisite dowry, the couple subscribe to an arrangement whereby the girl visits the boy at his house. While she is there a cannon (nulu-ani) is fired, and almost immediately women and others around begin the traditional incantations. People gather to know which girl has been "seized". The girl pretends to resist seizure, but is restrained by the young friends of the bridegroom, who have gathered for the purpose. Delegates are dispatched to the girl's parents to inform them of her capture. The parents demand the traditional payments and are appeased by the promise of the boy or his parents to pay by instalments. The marriage is not considered valid, however, until such payments have been made.[1]

Several cases of marriage by capture were recorded during fieldwork among older people. Most of the marriages were contracted with the consent of the girl. A typical case is that of a seventy-nine years old informant interviewed in Umudei Village in Onitsha. He had been married to five wives, and described his third marriage as one by "capture". While he was a Civil Servant stationed in another town, he became friendly with a girl there. Her parents refused to consent to his proposal of marriage, and so he"captured"her and brought her to his hometown in Onitsha. He never paid any dowry for her. She stayed with him for a number of years, but eventually left him and returned to her parents at Itani, another Igbo town. According to him, it was a valid legal marriage in those days, and Onitsha men who worked away from home usually brought back wives they had "captured" from the places where they had stayed. In most cases the parents of the girl concerned had refused to give the girl in

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1. Anthony Ezeife, "The Sociology of Ibusa Community," Bsc. Degree Thesis, University of Nigeria, Nsukka, 1971, pp. 40-41; See also Fadipe, op.cit., p.93.

marriage, but in some cases they were not asked.[1]

Many of the Onitsha wives interviewed by the present writer came from different parts of Nigeria, including a Fulani Moslem from Sokoto in the far north of Nigeria. Although some of these women may have been married with the initial consents of their parents, there is a suspicion that a few cases had been "marriage by capture", although the women did not describe them as such. A more accurate description perhaps is "marriage by elopement". In some cases dowry had been paid to the parents after the elopement, especially if there were children of the union.

There is conflict between "marriage by capture" and certain provisions of the Criminal Code Act, and what may have been a perfectly valid method of acquiring a wife in some traditional societies, may now give rise to criminal prosecution under Nigerian criminal law. For example, section 361 of the Criminal Code Act[2] provides:

> "any person who, with intent to marry or carnally know a female of any age, or to cause her to be married or carnally known by any other person, takes her away, or detains her, against her will is guilty of a felony, and is liable to imprisonment for seven years".

A marriage by capture, without the consent of the girl, constitutes an offence under this section, as well as the offence of rape under section 357 which provides:

> "Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, ...is guilty of an offence which is called rape".

If the girl is unmarried, and under sixteen years

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1. Recorded interview held with Mr. James E. Offodile, of Umudei Village Onitsha on the 15th July, 1977. Cf. Obi, "Modern Family Law", op.cit., p.228 who asserts that marriage by capture is unknown to Ibo customary law.

2. 1916, Cap 42, Laws of the Federation of Nigeria, 1958 Revision.

of age, even if she consents, the person who abducts her without her parents' consent may be liable to criminal prosecution under section 362 of the Criminal Code. The fact that the abductor believed the girl to be of, or above, the age of sixteen years, or that she was taken at her own suggestion is immaterial.

"Marriage by capture" without the consent of the girl or her parents was of frequent occurrence during the Nigerian Civil War. Numerous cases of girls "captured" by soldiers are recorded in the various Social Welfare Departments, especially at Onitsha, Nsukka and Enugu. These cases are categorised as "marriage by capture" by Social Welfare Officers, who do not seem to realize that they involve criminal offences. For example, in a case recorded at Onitsha Social Welfare Office, a Yoruba soldier captured a young girl from Asaba and forced her to live with him as his wife throughout the war. A son was born of the union. At the end of the war, her relatives succeeded in tracing her, and found her still living with the soldier. They demanded payment of ₦100 dowry. The soldier refused to pay the amount demanded. He said he had no money. As a result, the family took the girl and her son away during the soldier's absence from home, and married her to another man. The soldier applied to the Social Welfare Office for the custody of his son, since the girl and her parents refused to recognize his claims to the child. The Social Welfare Department advised him to go to the police to help him to recover his child.[1]

Unfortunately, the record of the case stopped at this point, but it would be interesting to know what the reaction of the police was to this interesting case which involved three aspects of law. The first aspect is the customary law of "marriage by capture, under which a girl captured by a man, especially during a war, becomes the

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1. File No. ONZ/SWU/12/S621, dated 1975; Onitsha Social Welfare Office.

man's wife by virtue of capture and cohabitation.[1] The second aspect involves the current customary law of the Igbos of Asaba, under which marriage is normally contracted by payment of dowry, and a woman is not regarded as the wife of a man who has paid no dowry for her, in spite of years of cohabitation.[2] Similarly, legal paternity and custody of a child would not be given to a father who has not paid the dowry for the marriage of its mother, in most areas.[3]

The third aspect refers to the circumstances in which the girl had been taken. Although the taking of the girl in this manner may have been lawful under traditional law, as stated above,[4] it now constitutes the offence of rape and abduction, and depending on her age at the time she was seized, may also constitute the offence of "abduction of a girl under sixteen". The customary law is therefore inconsistent with the written law and consequently unenforceable.

In spite of this illegality it is doubtful whether the police would institute criminal proceedings against the complainant in the above case. It is a common belief that rape during war is inevitable, and not in the same class as other criminal offences. In fact, few people recognize that it is a criminal offence.

Brownmiller, in her informative study of rape, notes the inevitability of rape during war:

> "Rape was a weapon of terror as the German Hun marched through Belgium in World War I. Rape was a weapon of revenge as the Russian Army marched to Berlin in World War II. Rape flourishes in warfare irrespective of nationality or geographic location.

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1. Marriage by capture was more frequently practised among the Northern communities than it was in the Southern States, and most of the soldiers involved in marriage by capture were from the Northern States.

2. See Thomas, Anthropological Reports..Edo-Speaking Peoples Pt.1,p.48.op.cit; Meek, Law and Authority, op.cit.,p.265; Nwogugu, Nigerian Family Law, op.cit., p.49; The Customary Law Manual, op.cit., p.238.

3. See Customary Law Manual, 1977,op.cit.,pars. 383,384, pp.315, 316. Legitimation by acknowledgement is possible in certain communities, see Ibid.,par. 385, p.316.

4. See above, pp.264-267.

> Rape got out of hand - 'regrettably' as the foreign minister was later to say - when the Pakistani Army battled Bangladesh. Rape reared its head as a way to relieve boredom as American GI's searched and destroyed in the highlands of Vietnam".[1]

But rape during war, although socially acceptable behaviour among certain peoples in ancient times, for example, the Greeks, is outlawed by the modern international community.

In Nigeria, it is a criminal offence whenever committed. In peace time, it is comparatively rare, especially with reference to adult women. For example, there are less than a hundred cases reported involving rape, in all the Nigerian law reports. Of 62 cases collected from these reports by the present writer, only nine involved adult women. The number of rapes committed by adult men and tried in the High Courts of the former East Central State was eight in 1971, and twelve each in 1972 and 1973.[2] This gives a maximum rate of 1 per 600,000 of the population.[3]

In 1926, Talbot wrote of the women of Southern Nigeria:

> "Enquiries about rape generally elicited a smile; it was apparently considered that genuine cases were few and far between, and that force had seldom to be employed by a man to effect his object. This opinion accounts for the fact that such an act was usually treated merely as adultery".[4]

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1. Susan Brownmiller, Against Our Will; Men, Women and Rape, 1975, p.32; See also Barbara Toner, The Facts of Rape, (London: Hutchinson and Co. (Publishers) Ltd., 1977), p.173-182.

2. Annual Abstract of Statistics, 1974, Federal Office of Statistics, Lagos, Nigeria, p.180, Table 16:1.

3. The population of East Central State in 1963 was recorded as 7,228 thousand, Annual Statistics, 1974, op. cit., p.14, Table 2:1. cf. The percentage of rapes in East Central State with 4 per 100,000 population in England and Wales 1975, (Criminal Statistics, England and Wales, 1975 H.M.S.O), and 47.2 per 100,000 population among the Gusii, a Bantu-Speaking tribe in Kenya in 1955-56. Robert A. Levine, Gusii Sex Offences: A Study in Social Control", American Anthropologist, Vol.61, 1959, pp.965-990 at p.965.

4. Talbot, Peoples of Southern Nigeria, op.cit., pp.631,655; Contrast the statement credited to Landolphe about the Binis: "The man who commits a rape is at once considered married to the girl; if the assault has been committed at night the two are proclaimed as married as soon as daylight appears - they are united by this simple

Footnote continued.....

This statement is defamatory of Nigerian women and has been rightly criticized by Begho.[1] Lawick-Goodall,[2] in her study of wild chimpanzees at the Gombe Stream Reserve in Tanzania noted that the chimps, male and female were "very promiscuous, but this does not mean that every female will accept every male that courts her. She recorded one female who by the telltale pink swelling of her genital area was ready to welcome male advances, but who nevertheless displayed an aversion to one particular male who pursued her. Even professional prostitutes are known to refuse certain clients who do not appeal to them. There is no evidence that women in contemporary Nigeria are more promiscuous or more easily seduced than women elsewhere, for example England, and yet rape has remained relatively rare in Nigeria.[3]

The capture of girls during the war created social problems which are still in evidence in certain areas in Nigeria. Many of the girls "captured" and forced to cohabit with their captors, were treated not as wives, but rather as slaves, although they were allegedly "married by capture". For example, a complaint brought to the Social Welfare Office in Onitsha involved one Blessing Okafor and Usuman. Blessing claimed that she was captured by Usuman from a refugee camp at Achala in Anambra State where she was staying at the time. She stated that Usuman forced her to follow him at gunpoint and she complied for fear of death. He took her to his army camp at Nando, where she lived with him as his wife until the end of the war. She alleged that she was treated as a slave, and subjected to severe beatings from Usuman, the husband, who

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Footnote 4 continued....formality. If the girl be too young to bear [a] child the man is fined, as his action is considered criminal" - see Roth, Great Benin, op.cit., p.39.

1. See Begho, Law and Culture, op.cit., p.59.

2. Jane van Lawick-Goodall, In the Shadow of Man, (London: William Collins, Sons and Co. Ltd., 1971), pp. 173-174.

3. The reason why rape of women is rare in Nigeria must be sought elsewhere and may be psychological. See Barbara Findlay, "Cultural Context of Rape", 60, Women Lawyers Journal, 1974, p.199; cf. Begho, op.cit., p.60.

also habitually called her yamili,(Hausa word for slave). She complained several times to the Officer Commanding No. 1 Infantry Brigade, Apollo II of No. 140 Battalion, Nigerian army, who warned the husband to desist from his cruel behaviour, but there was no improvement. One day in 1972, her father accidentally saw her with Usuman at the market. The father asked Usuman to bring the dowry and legalize the marriage, "in order to cover the shame of his daughter", but the husband, although he promised to do so, never did. In May 1974, he drove her away with her three children. Blessing's father claimed the three children, since no dowry had been paid, and refused to negotiate with Usuman or the Social Welfare Officers to whom Usuman complained.[1]

In some cases, where girls had lived with their captors and then been deserted by them, they found it very difficult to live in their own society, where they were often referred to as "Hausa slave". A case in point is that of The State v. Ukazu.[2] The accused, a young woman, was indicted for the murder of her young child, fourteen days old. She was unmarried, and as her parents were without a male issue of their own, she was encouraged to have as many children as possible for them in the hope of getting a male child. Her mother looked after the three children she conceived in this manner before the war. During the war, she was captured by a Hausa soldier and forced to live with him. At the end of the war, she asked the soldier to marry her according to customary law, by payment of dowry, since she knew her family would not relish the idea of her living with a non-Igbo man in this manner. The soldier refused to marry her, although she was pregnant for him. She left him and returned home where she delivered a male child. Her mother welcomed the child.

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1. File ONZ/SWU/12/S534, dated 7 August, 1974. Social Welfare Office, Onitsha.
2. [1973] Suit No. HO/36C/72, unreported, Okigwe High Court, 31 May, 1973.

Some days after, the girl went to the Army Camp, dumped the baby in a latrine pit, and returned home. The cries of the child led to his discovery. He was recovered alive from the pit, covered all over with human faeces and worms. He received medical attention at the Mission Hospital nearby, but died on the evening of the day following his discovery.

The accused claimed that the villagers mocked her for getting a baby for a Hausa man, and called her names. Since her father had died during the war, the child was considered a bastard, unlike the three children born during her father's lifetime who were regarded as legitimate children of her father under Igbo customary law. To hide her shame she attempted to get rid of the illegitimate child. She was found not guilty of murder but guilty of infanticide, and sentenced to five years imprisonment.

This is a sad case. The accused was a victim of circumstances beyond her control. First, she was the victim of the customary law under which a father with no male heir is permitted by law to keep one of his daughters unmarried for the purpose of producing male heirs for him. The custom is referred to as idigbe. Additionally she was also the victim of war, and of tribal prejudice.

Her case illustrates the vulnerability of women whose sexuality tend to be exploited by men in a variety of circumstances, but nearly always for the men's own benefit and satisfaction.

Hostile capture of women by soldiers during the war has, it is alleged,[1] been a potent contributor to the present instability of marriage among the Igbos. Girls who have been deserted by soldiers from other communities are invariably repulsed by men from their own community, who do not consider them fit for marriage, although their initial union with the soldiers concerned may have been

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1. See Social Welfare Report: Progress Report for Aguata, Oct. and Nov. 1973.

forced on them. Social inferiority complex often compels these women to abandon the children begotten for their captors, and to resort to prostitution.

E. Marriage by "Mutual Consent Only"

Marriage by "mutual consent only" is a recognized form of marriage according to Yoruba customary law, in which the only legal requirement is the mutual consent of the prospective spouses. It is sometimes referred to as "marriage by elopement", but no dowry is payable, either before or after the marriage.

Fadipe, in his list of the types of marriages practised by the Yorubas includes, "marriage by mutual consent of the principal parties which neither assumes the consent of parents nor involve the payment of bride-price".[1]

Ward[2] refers to this type of marriage as "marriage by elopement". He records the fact that it is widely practised among certain Yoruba communities, for example Ilajaland, where there is no regular system of marriage by payment of dowry, and among the Ijaws of the Ondo Creeks, where it has replaced dowry marriage as the customary mode of marrying a wife.

Johnson, after listing the essentials and formalities of the ordinary dowry marriage says:

> "There are cases in which all the above forms and ceremonies are not gone through, and yet the woman is regarded as the lawful wife of the man of her choice. Mutual consent is the only thing indispensable. Of such cases some may be girls who when of age, will not accept the man chosen for them from childhood, except one of their own choice. Some may be widows who fail to be mated

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1. Fadipe, The Sociology of the Yoruba, op.cit., p. 63.

2. Ward, Marriage Among the Yoruba, 1937, op.cit., p. 68.

> at the home of her [sic] late husband. Some may be slaves who have redeemed themselves, or a captive of war, or one bought to be made a wife of. In all such cases the woman's free consent, and the recognition of her by the members of the man's family, are all that is required for her to be regarded as the man's lawful wife".[1]

Marriage by "mutual consent only" is still practised by the Yorubas, and among some communities, for example, Ibadan, it may now be regarded as institutionalized. During field work in Ibadan, the present writer analysed 1,116 cases involving family disputes heard in the Grade B, Customary Court, No. 4, Mapo, Ibadan during 1976. Of these cases, 276 involved paternal disputes, while 840 were divorce cases. Of the divorce cases, 303 were brought by men, and 537 by women. In all the divorce cases brought by the men, dowry had been paid, but of the 537 cases brought by the women, 326 of the wives claimed that no dowry had been paid on their behalf at the time of the marriage, or at all. In most of these cases, only the wife appeared, and so her evidence was unchallenged. It may be that the men were too anxious to get rid of their wives to appear and contest these claims. But in the great majority of the cases where the wives admitted that dowry had been paid, the husbands had put in appearances if only for the purpose of receiving the dowry refunded by the wives. It is therefore safe to conclude that no dowry had been paid as alleged by the 326 wives. This means that 38.8 percent of the total number of marriages were contracted without payment of dowry, and were therefore marriages by "mutual consent only".[2]

Some confirmation of this evidence is provided by

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1. Johnson, The History of the Yorubas, 1921, op.cit., p.116; See also Fadipe, Sociology of the Yoruba, op.cit., p.92; the practice of marriage by mutual consent only was formerly confined to slaves and people without kin; Talbot, Peoples of Southern Nigeria, op.cit., p.433; "A woman can also be married without the Igbeyawo ceremony, the only requirements being mutual consents".

2. It is worthy of note that these wives thought it necessary to obtain a judicial divorce, even though no dowry had been paid with reference to the marriages.

the statistics of "Matrimonial Conciliation and Family Case-work" in the Social Welfare Department at Ibadan. For example, the statistics of Family Casework for the month of August, 1977, the last completed month for which statistics were available at the time of the field-work for this thesis were as follows:

TABLE 3:1

TYPES OF MARRIAGES HANDLED BY SOCIAL WELFARE DEPARTMENT, IBADAN, DURING AUGUST 1977.

TYPE OF MARRIAGE	NUMBER DEALT WITH	% of TOTAL
Customary Law Marriage; by payment of dowry	47	29.6
Customary Law Marriage; by seduction[1]	30	18.9
Customary Law Marriage; by mutual consent only	72	45.2
Marriage under the Nigerian Marriage Act	5	3.1
Marriage according to Muslim rites	3	1.9
"Church Marriage"[2]	2	1.3
Total Number of Marriages	159	100.0

Source: Statistics were supplied by the Social Welfare Department, Ibadan.

Marriage by mutual consent accounted for 45.2 percent of the total number of marriages dealt with. This percentage may be compared with the statistics from the

1. Marriage by seduction is a valid legal marriage among Yorubas, and is effected when a man seduces a married woman, persuades her to leave her husband and marry him, and he repays the dowry to the former husband - see Faremilekun and Ors. v. The State [1947] 3 W.S.C.A. 86 at p.109. Cf. Chawere v. Johnson [1936] 12 N.L.R.4.

2. A "church marriage" is not legally valid unless celebrated also under the Nigerian Marriage Act.

court cases. If all the divorce cases recorded for 1976 are taken, 38 percent of the marriages were contracted by mutual consent only. If the divorces initiated by women only are taken, the percentage is even higher, 62.5 percent. The nature of the association in Matrimonial Conciliation and Family Casework of the Welfare Department in the former Western Region for the year, 1967-1968, reproduced in Table 3:2 below provide further confirmation of the large proportion of Yoruba marriages contracted by mutual consent only. Marriage by "mutual consent only" predominate in all areas of the former Region.

It is significant, however, that both the marriages from the Court cases and those handled by the Social Welfare Departments involve marital breakdown. Although "marriage by mutual consent only" figures prominently among broken marriages, they do not form a significant proportion of total marriages contracted among the Yorubas generally. For example, of the eighty women interviewed in Ibadan and the two Yoruba areas where field-work was conducted, only nine (11.2 percent) of the women stated that no dowry had been paid on the occasion of their marriage. From this it may be concluded that among the Yorubas marriages contracted by payment of dowry, which involve maximum family participation, are more stable than marriages where no dowry has been paid, or marriages where family participation is minimal or altogether absent.

Commenting on this phenomenon, the Annual Report of the Department of Social Welfare for 1967-68 states:

> "It would appear that the social norm which is characteristic of a particular marital association bears direct relationship with the degree of the social dislocation as well as the solidarity of marriages contracted under the respective systems ...In marriages by mutual consent and seduction, the age long reverred sanctions and connubial blessings by elders are side-tracked. Thus the elements by which tradition holds marriage together are absent in these marriages".[1]

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1. Annual Report: Ministry of Economic Planning and Social Development, 1967-68, Western State of Nigeria, Official Document, No. 2 of 1971, pp.9-10.

Marriage by mutual consent only as a recognized type of marriage is confined to the Yorubas. Among other communities such a union is regarded as concubinage.[1]

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1. But see the custom among certain pagan Fulani communities where any man who could successfully seduce another's wife to his house ipso facto divorced her from her former husband and married her himself, - see Wilson-Haffenden, op.cit., p.110.

TABLE 3:2

TYPES OF MARRIAGES, Handled by SOCIAL WELFARE DEPARTMENT, Western State of Nigeria, 1967-68

NATURE OF ASSOCIATION IN MATRIMONIAL CONCILIATION AND FAMILY CASE-WORK

	Abeokuta	Akure	Ibadan	Oshogbo	Ikeja	Ife/ Ilesha	Ijebu	Shagamu	Total
Marriage according to local custom or customary law	65	20	78	7	45	60	23	34	332
Marriage according to the Ordinance with Church Ceremony	4	3	-	-	1	2	1	1	12
Marriage according to the Ordinance without Church Ceremony	-	-	12	2	-	-	3	-	17
Marriage according to the Ordinance with Muslim Ceremony	-	-	-	-	-	-	-	-	-
Marriage according to Muslim rites	3	1	11	1	-	-	-	-	16
Marriage by mutual consent	102	115	166	8	137	99	55	40	722
Marriage by seduction	68	29	34	-	-	40	44	25	340

TABLE 3:2 continued

	Abeokuta	Akure	Ibadan	Oshogbo	Ikeja	Ife/ Ilesha	Ijebu	Shagamu	Total
Marriage by Abduction	-	-	-	-	-	-	-	-	-
Marriage by inheritance	1	1	-	-	-	-	-	1	3
Total	243	169	301	18	183	201	126	101	1,342

Source: Annual Report: Ministry of Economic Planning and Social Development, Western State of Nigeria, Official Document, No. 2 of 1971, Table XIX, p. 26.

CHAPTER IV

Polygamy and its Effects on the Status of Women

"When the fair sex enters upon the subject of polygamy, it apparently loses all self control not to say its senses"[1]

Sir Richard Burton, 1861

1. Introduction

The topic that provoked maximum discussion during fieldwork for this thesis was undoubtedly polygamy. It is an emotive subject. Basden, writing on polygamy among the Igbos after more than thirty-five years sojourn in Igboland, says:

> "Polygamy is a subject that is honeycombed with pitfalls; a slippery path even to the wary. Anything written is open to criticism, because its problems, complications and ramifications are so manifold. With the exercise of extreme caution, one is still liable to misjudge, or to fail to discern the true aspects of this widely spread and deeply rooted institution".[2]

Burton, the nineteenth century peripatetic digester of continents, was equally categorical in voicing the trepidation he felt on being confronted with the necessity of writing on polygamy among the Mormons in America. He says:

> "I approach the subject with a feeling of dispair, so conflicting are opinions concerning it, and so difficult is it to neutralise in Europe the customs of Asia, Africa, and America, or to reconcile the habits of the 19th century A.D. with those of 1900 B.C".

The apprehension expressed by these male writers is intensified for the female writer on polygamy, for she must always bear in mind the male conviction so characteristically expressed by Burton, and quoted at the beginning of this Chapter.

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1. Richard Burton, The City of the Saints and Across the Rocky Mountains to California (London: Longman Green: Longman and Roberts, 1861).
2. G.T. Basden, "Niger Ibos: A Description of the Primitive Life Customs and Animistic Beliefs..." (London: Frank Cass and Co. Ltd. 1938, New Imp. 1906, p.228.

There is an importunate temptation to omit the topic entirely, but so vital is it to any assessment of the position of women in traditional as well as modern, Nigeria, that failure to expose it to the searchlight of enlightened discussion would detract from the value of any ultimate conclusion.

At Common Law, entering into a subsequent marriage while the first remains undissolved was designated "polygamy". Bigamy, strictly speaking, means twice married, as its derivation clearly shows. This was never an offence at Common Law, but of ecclesiastical cognizance exclusively. It was not punishable by an ordinary common law tribunal.[1] Polygamy is the proper terms to describe the offence of having two extant "marriages", contrary to the law, but by long usage, bigamy has come to be understood in law to be the state of a man who has two wives, or a woman who has two husbands at the same time, this practice being legally forbidden.[2] The benefit of clergy was taken away from the offence of bigamy[3] and the ecclesiastical offence was frequently used in the Common Law Courts as the subject of a counterplea to a claim of benefit of clergy, in the prosecution of clergyable offences.[4] Later, however, bigamy was declared to be no longer an impediment to receiving the benefit of clergy[5] and this was the state of the law on the subject until the reign of James I, when bigamy was made a felony punishable in the civil courts.[6]

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1. See Pollock and Maitland, History of English Law, op. cit. Vol. II, p.374;"Adultery was not, bigamy was not, incest was not a temporal crime"; see also C.J.S. 10 Bigamy, S.2; and State v. Sellers,[1926] 134 S.E.873; 140 S.C.66.

2. 10 Am.Jur.2d. par.2, note 3; C.J.S., 10 Bigamy S.2; and see Gise v. Commonwealth, 81 P.A. 428.

3. 4 Edward I, Chapter 5.

4. Barber v. The State, [1878] 50 Md. 101.

5. 1 Edward VI, Chapter 12 (16); see also Barber v. The State, [1878] 50 Md; 161.

6. James I, 1604, Chapter 11, provided that if any person, being married, shall afterward marry again, the former husband or wife being alive, "such offense shall be felony, and the person and persons so offending shall

footnote continued.....

In American jurisprudence, the terms "bigamy" and "polygamy" are now used interchangeable. For example, the offence of having two husbands or wives contrary to the law is designated "polygamy" in the statute book of Maine, Massachusetts, Michigan, New York, and Vermont.[1]

In Nigeria, however, polygamy exists where a person is married to more than one spouse at the same time having the legal right to be so married. A Nigerian man has such a right when he is married under Customary or Islamic Law. Where a man is married under the Nigerian Marriage Act, and he purports to marry another wife, whether under the Statute or not, he commits the offence of bigamy.[2] In other words, in Nigerian law a married person who has no legal right to marry another spouse, and who does so, is a bigamist, and not a polygamist.

The position is the same in English law. Bromley says:

> "English law regards a marriage as polygamous if it is possible for either party to take another spouse during its subsistence whether he does so or not".[3]

The legal difference between polygamy and bigamy under English law arose in the celebrated case of Hyde v. Hyde,[4] where the distinction was not properly made because of the Judge's mistaken belief that the marriage in the case was polygamous. In law the marriage was monogamous.

Hyde was an Englishman by birth. He joined a congregation of Mormons in London in 1847, and was soon

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Footnote 6 continued.....suffer death as in cases of felony"; see People v. Martin [1922] 205 Pa.121; 188 Cal. 281; 21 A.L.R. 1399.

1. 10 Am. Jur. 2d. S.1; see also C.J.S. 10 Bigamy, S.1, note 2; McBride v. Graeber [1915] 85. S.E.; 16 G.A. App.240; State v. Martinez [1926] 250 Pa. 239.

2. Criminal Code Act, 1916; Cap 42, Laws of the Federation of Nigeria, section 370.

3. Bromley, Family Law, 1976, op.cit. p.55; R.v. Sagoo [1975] 2 All E.R.926, 929, C.A. where it was stated that a marriage which is to be the foundation for a prosecution for bigamy must be a monogamous one; R.v. Sarwan Singh [1962] All E.R.612.

4. [1866] L.R. 1 P. & D, 130.

afterwards ordained a priest of the Mormon church. He became engaged to one Miss Hawkins in London. Miss Hawkins and her mother later went to Salt Lake City in the Territory of Utah, in the United States, the headquarters of the Mormon church. They were joined there by Hyde, and in April 1853, the parties, having apparently acquired a U.S. domicile, were married according to the rites of the Mormon church by Brigham Young, the president of the church. After cohabitation for three years, Hyde left Utah and renounced the Mormon faith. He was excommunicated by the Mormon hierarchy,[1] who also declared that his wife was free to remarry. In 1859 or 1860, his wife remarried to the co-respondent, according to the Mormon form, in Salt Lake City and cohabited and had children with him there. Hyde returned to England, and having resumed his English domicile, he petitioned for a divorce on the ground of his wife's adultery with the co-respondent. At the time of Hyde's marriage in Utah, polygamy had been declared as part of the Mormon doctrine, but the petitioner had never taken a second wife. J.P. Wilde (afterwards Lord Penzance), held that the marriage was polygamous, and that the English law of divorce was appropriate only to a marriage which was "a voluntary union for life of one man and one woman to the exclusion of all others",[2] and not to a polygamous marriage. He stated that "it would be quite unjust and almost absurd to visit a man who among a polygamous community, had married two women, with divorce from the first woman, on the ground that, in our view of marriage, his conduct amounted to adultery coupled with bigamy".[3]

It is a quirk of fate that Wilde J., while laying down a pontifical censure of what he erroneously

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1. The text of the excommunication is quoted by Morris, - The "Recognition of Polygamous Marriages in English Law". Harvard Law Review, 1953-1956, 961 at p. 1007 note 222.
2. Hyde v. Hyde [1866] L.R.1 P. and D. 130, 133.
3. Ibid, p. 135.

believed was a polygamous marriage, promulgated a definition of a monogamous marriage which became the guiding precedent of the courts adjudicating on marriage, in most commonwealth countries.[1] Vesey-Fitzgerald's opinion, that the utility of the definition as a working one "has probably averted criticism from the rest of the judgment",[2] is probably true, because, as will be shortly shown, Hyde's marriage, contrary to what has been believed for more than a century by the Common Law legal world,[3] was not polygamous, since Hyde had married no other woman at the time his petition was brought, nor could he have done so, either in America or in England. His marriage was a valid monogamous marriage.

In view of the fact that it has not been established in any known work that Hyde's marriage was monogamous in law, the following proof is submitted.

The nature of the marriage in Hyde v. Hyde.

As previously noted, Hyde was a Mormon.[4] The Mormons are a religious sect in America, who because of religious prosecution, mainly due to their declared practice of polygamy, had made several attempts to establish an independent State within the United States, where they would have freedom to practise polygamy as dictated by their religion. Attempts to found a State

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1. For e.g. Savage v. MacFoy [1909] Renner's Gold Coast Reports, 504, at p. 507, Nigeria; R.v. Amkeyo [1917] E.A.P.L.R. 14 - East Africa. United States v. Cannon [1885] Pa, 369, p. 381; U.S.A.
2. S.G. Vesey-Fitz Gerald, "Mixed Marriages", Current Legal Problems, 1948, Vol. 1, pp. 222-242 at p.227.
3. Vesey-Fitzgerald, op.cit., put forward the suggestion that the law of the United States was the law of Utah; and that local vagaries had none but a strictly local operation, but the writer added: "this difficult point of United States constitutional law is not propounded as certain", and he suggested that the court ought to have considered it. He submitted no evidence to support his suggestion.
4. The community of the Mormons in the United States, which styled itself "The Church of Jesus Christ of Latter day Saints" was founded by Joseph Smith of Sharon, Vermont in 1830. Joseph Smith maintained that

footnote continued.....

were made in Ohio, Missouri and later Illinois.[1] A settlement was finally established at Salt Lake City and a petition was made to Congress for admission to the United States as the State of Desseret. This petition was ignored and remained unanswered by Congress.

Irritated and frustrated by the contemptuous silence of the Federal Government to their petition to form an independent State within the United States, they "duly erected themselves into a free sovereign, and independent people with a vast extent of territory".[2] They set up a Provisional Government of the State of Desseret. The Constitution adopted for the State showed that they were still citizens of the United States, and that it was only adopted, "until the Congress of the United States shall otherwise provide for the Government of the Territory".[3]

On 9 September, 1850, three years after the founding of Salt Lake City, the United States in Congress "assembled, sheared the self-constituted Republic of its fair proportions and reduced it to the the infant

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Footnote 4 continued..... the "Book of Mormon" was revealed to him in 1827 as a parallel volume to the Holy Bible. In 1843 in a second revelation, he claimed he was commanded to practise polygamy. He was succeeded as President of the Mormon Church by Brigham Young under whose leadership Salt Lake City was founded in 1847; For accounts of the Mormons and their practice of polygamy see Burton, The City of the Saints, 1861; Irving Wallace, The Twenty-Seventh Wife, 1961 (Four Square Book 1965); M.R. Werner, Brigham Young (New York: Harcourt, Brace and Co. 1925; Franklin Stuart Harris and Newbern I. Butt, The Fruits of Mormonism, (New York: MacMillan Co. 1925); Kimball Young, Isn't One Wife Enough? (New York: Henry Holt and Co., 1954).

1. See Harris and Butt, op.cit., pp. 43-57; Ruth Kauffman and Reginald Kauffman, The Latter-Day Saints; A Study of the Mormons in the Light of Economic Conditions (London: Williams and Norgate, 1912).
2. Burton, The City of the Saints, 1861, op.cit., p.35.
3. See the preamble to the Constitution, set out in full in Burton, City of the Saints, op.cit., p.350-351.

conditions of New Mexico".[1] A Bill organizing Utah Territory was signed by President Fillmore, and on 5 April, 1850, the Assembly met and Utah Territory was duly organized. On 9 September, 1850, the Act organizing the Territory of Utah became law.[2] Brigham Young the President of the Mormon Church was appointed Territorial Governor of Utah.

Utah retained her territorial status, despite several attempts by the Mormons to attain Statehood, until the Enabling Act - "an Act to enable the people of Utah to form a constitution and State Government, and to be admitted into the Union on an equal footing with the original State" - was approved on 16 July, 1894,[3] and on 4 January, 1896 President Cleveland signed the Act admitting Utah as a State of the United States.[4]

It is therefore submitted that at the time of John Hyde's marriage in Utah in April, 1853, as well as at the time his divorce petition was heard in 1866, Utah was a Territory of the United States.[5]

During their stay in Nauvoo, Illinois, the Mormons had been granted a charter by the Illinois legislature, which gave them the right to legislate for the city, but it is doubtful whether any law permitting the practice of polygamy was enacted by them before the charter was withdrawn. This is because, although the doctrine of "plural" or "celestial" marriage, as the Mormons preferred to call it,

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1. Burton, The City of the Saints, op.cit., p. 352.
2. Stat. 453, Comp. Laws of Utah, 1876, p.88; Murphy v. Ramsey and Ors.[1885] 114 U.S., 15.
3. 28 Stat. 108.
4. For a general discussion of the political struggle for Statehood, see Howard Lamar, "Statehood for Utah" in Mormonism and American Culture, edt. by Marvin S. Hill and James B. Allen, (London: Harper and Row, 1972), pp. 127-141; and Klaus Hansen, "The Political Kingdom as a Source of Conflict" in Mormonism and American Culture edit.by Hill and Allen,op.cit., pp.112-126.
5. The Report of Hyde's case stated that "Utah was a territory not within any State"; see p. 131. The omission of a capital letter for the word territory made it appear as if it meant merely land not within any State.

was revealed to Joseph Smith their first leader on July 12th, 1843, in Nauvoo, it was not officially declared a tenet of the church until August 29th, 1852, four years after the founding of Salt Lake City. Two years after the organization of Utah Territory, Brigham Young announced to his followers, the nation and the world, that henceforth the doctrine of plural marriage was an official tenet of the Mormon church.[1] In fact, before this announcement the Mormons had consistently denied the practice of polygamy. The Book of Doctrine and Covenants, the revelation given to Smith at Kirtland, Ohio, denied and denounced polygamy. In 1846, at a conference of the Saints in Manchester, England, Parley Pratt, an elder of the church, had declared polygamy to be "another name for whoredom;" and in 1850 at Boulogne, France, John Taylor, another elder, had denied that the theory or practice of polygamy was part of the Mormon church doctrine or ritual. Werner reports that at "the moment in 1850 when he was issuing vehement denials at Boulogne, John Taylor had four wives in Utah, and was courting a young girl who lived on the isle of Jersey."[2]

It was an open secret that a few of the leaders of the church had furtively practised polygamy before its official declaration, or even before the revelation ordered Smith to practise it, or lose his priesthood. Wallace writes,

> "Evidently Smith had a roving eye and a need for sexual variety. Yet his stern puritanical upbringing did not give him the easy conscience of a rake; he could not allow himself mistresses, And so, possibly to have his cake and eat it too he allowed himself a plurality of wives".[3]

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1. Wallace, op.cit., p.68.
2. Werner, op.cit., p.280-282.
3. Wallace, op.cit., p.48; see also Werner, op.cit., p. 129-130.

Smith is reported to have had about forty-nine wives and within eight years had married twenty six young women, most of them not yet twenty years old.[1]

The constitution of the Territory of Utah provided that

> "All the laws passed by the Legislative Assembly and Government shall be submitted to the Congress of the United States and if disapproved shall be null and of no effect".[2]

It is therefore evident that no law permitting the practice of polygamy could have been passed by the Territorial Legislature without the sanction of Congress, and such sanction would not have been given, since the practice of polygamy was the main reason why statehood was denied to the Territory. Burton says of Congress's refusal to grant statehood to the Territory

> "The cause is, I believe polygamy, which until the statute law is altered, would not and could not be tolerated either in America or in England".[3]

This belief is buttressed by the fact that section 3 of the Enabling Act, which eventually granted statehood to the Territory specifically provides as follows:

> "...that perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her religious worship; provided, that polygamous or plural marriages are forever prohibited".[4]

The first anti-polygamy statute passed by the United States Congress, which applied to all States, Territories and other places within the jurisdiction of the United States was enacted on 1 July, 1862, and was entitled "An Act to punish and prevent the practice of polygamy in the Territories of the United States, and

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1. Wallace, Ibid., pp. 48-49; Werner, op.cit., pp.131-153.
2. For the Constitutional Provisions, see Burton, The City of the Saints, op.cit., p. 366.
3. Burton, op.cit., p. 352.
4. Enabling Act, 1894; Section 3, 28 Stat. 107; This provision is irrevocable without the consent of the United States and the people of the State of Utah; see also United States v. Cannon, [1885] 7 Pac.369, at p. 381.

other places, and disapproving and annulling certain Acts of the Legislative Assembly of the Territory of Utah.[1] This Act, was followed in 1874, by another anti-polygamy statute, section 5352 of the Revised Statutes, commonly referred to as the Poland Law,[2] which was in turn amended by another Act of 1882, known as the Edmunds Act.[3] These Acts provide as follows:

> "Every person having a husband or wife living who marries another, whether married or single, in a Territory or other place over which the United States have exclusive jurisdiction is guilty of bigamy, and shall be punished by a fine of not more than $500.00, and by imprisonment for a term of not more than five years...."[4]

The validity of this legislation enacted by Congress against polygamy, was challenged in the case of Reynolds v. United States.[5] Reynolds was charged with bigamy in violation of Rev. Stat. Section 5352. He was convicted by the Utah courts and he appealed to the United States Supreme Court, inter alia on the following grounds:

(1) That the Poland Bill, Rev. Stat. Section 5352 was unconstitutional.

On this ground the Court said

> "Undoubtedly Congress under art. 4, section 3 of the Constitution which gives power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States", and under the decision of this court upon it, may legislate over such territory, and regulate the form of its local government".[6]

The Court held that section 5352 was in all respects constitutional and valid.

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1. Act of Congress, 1862, 12 Stat. C. 126, par.I.; see Murphy v. Ramsey and Ors. [1885] 114 U.S. 15.
2. Passed on 8 January, 1874.
3. Passed on 6 March, 1882; 22 Stat.30, S.1; see also [1887] 24 Stat. 635.
4. 22 Stat. 30, S.1.
5. [1878] 98 U.S. 145, 25 L.ed. 244 affirming The State v. Reynolds 1 Utah, 226.
6. Reynolds v. The United States [1878] 98 U.S.152; see also Davis v. Beason [1890] 133 U.S. 333 at p.342."The cases in which the Legislation of Congress will

footnote continued.....

(11) That at the time of his alleged second marriage, he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, and a believer in its doctrines. That it was a duty of male members of the church to practise polygamy. That he believed that failure to practise polygamy, as enjoined by God in a revelation to Joseph Smith, by such male members would be damnation in the life to come.

The defendant argued that since he was married in "pursuance of and in conformity with what he believed at the time to be a religious duty",[1] the verdict must be not guilty.

The Court rejected this argument. After tracing the history of polygamy under the Common Law, the Court stated as follows:-

> "By the statute of James II (C.11) the offence if committed in England and Wales was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications in all the colonies. In connection with the case we are now considering it is a significant fact that on the 8th of December, 1788, after the passage of the Act establishing religious freedom, and after the Convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that "all men have an equal, natural, and inalienable right to the free exercise of religion, according to the dictates of conscience, the legislature of that State substantially enacted the statute of James I, death penalty included because, as recited in the preamble, it hath been doubted whether bigamy or polygamy be punishable by the laws of this Commonwealth... From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional

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Footnote 6 continued..... supersede the legislation of a State or Territory, without specific provisions to that respect, are those in which the same matter is the subject of legislation by both".

1. Ibid, p. 163.

> guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.[1]

The appeal was refused. It should be noted that Reynolds was Brigham Young's secretary, and he was specially selected to test the validity of the Mormon practice of plural wives. In 1874, he had just married a second wife, and he voluntarily turned himself over to the authorities as an admitted polygamist.[2]

Had Hyde attempted to marry another wife at the time his divorce suit was heard in 1866 he would have been liable for prosecution according to the law of the United States.[3] In United States v. Musser,[4] the defendant, a Mormon, was indicted for unlawful cohabitation as defined in the Act of Congress of 22 March, 1882. The indictment charged that the defendant unlawfully cohabited with three women between 1 May, 1882, and 1 April, 1885, "in the habit and repute of marriage, holding that relationship out to the world by his language and conduct. The Utah courts found him guilty. He appealed to the Supreme Court, on the ground, inter alia, that the Court below erred in admitting evidence of his conduct and relationship to the women before the day first mentioned in the indictment, or to prove his purported marriage to the women before the law in question took effect. The Supreme Court rejected these arguments. Zane, C.J., said:

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1. Reynolds v. United States [1878] 98 U.S. 145, p.165; see also Davis v. Beason [1890] 133 U.S. 333 at p.342 "Bigamy and polygamy are crimes by the laws of the United States, by the laws of Idaho, and by the laws of all civilized and Christian countries and to call their advocacy a tenet of religion is to offend the common sense of mankind".

2. See Irving, The Twenty-Seventh Wife, op.cit., pp.343, 345, Thirty thousand persons petitioned President Hayes to show leniency to Reynolds, but the clemency requests were refused. Reynolds served two years imprisonment with hard labour.

3. See e.g. Morey v. Commonwealth [1867] 108 Mass. 433, a Mormon was indicted for lewd cohabitation with two "wives".

4. [1885] 7 Pac., p. 389.

> "The Common law has been in force in this territory more than a generation; and an act of congress against bigamy more than 22 years. None of the conduct or circumstances in evidence extend back so far. They tend to prove a relationship unlawful in its inception. I am of the opinion that there was no error in admitting evidence for the purpose of showing marriage between the defendant and the woman named, before the law took effect or showing that he cohabited with them as his wives before that time".[1]

In view of these and other decisions[2] to the same effect, it is respectfully submitted that the practice of polygamy has always been an offence under the Common Law throughout the United States of America, and remained an offence at the time of Hyde's marriage, and at the time he petitioned for divorce in the English court. There is also no doubt that at the time of the hearing of Hyde's divorce petition, polygamy was definitely prohibited by the statutory laws of the United States. The Morrell Act was enacted by Congress in 1862,[3] and it made bigamy a crime in all the Territories of the United States. Hyde v. Hyde[4] was decided in 1866. It is remarkable that the Counsellor of the Supreme Court of the United States, called to give expert evidence in Hyde v. Hyde failed to

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1. Ibid, pp. 396-397; see also State v. Clawson [1885] 7 Pac.; Snow v. United States, 118 U.S. 346; 30 L.ed. 207; 6 S.C.1059; United States v. Snow [1886] 120 U.S. 274; 9 Pac. 501, 4 Utah, 280; United States v. Eldredge [1887] 13 Pac. 673; 5 Utah 161; United States v. Smith [1887] 14 Pac. 291; 5 Utah 232; United States v. Peay [1887] 14 Pac. 342, 5 Utah, 263; State v. Locke [1915] 151 Pac. 717; Re Nielson [1889] 131 U.S. 176; 33 L.3d. 118; Davis v. Beason [1890] 133 U.S.333, 33 L.ed. 637; United States v. West [1891] 27 Pac. 84; 7 Utah 437.

2. See United States v. Cannon [1885] Pacific Reporter, 369; Thayer v. Thayer, 101 Mass.111; See cases at note p above. Between 1882 and 1889, under the Edmonds Act, 1882, 24 Mormons were convicted for polygamy, and 909 imprisoned for unlawful cohabitation. In 1877, Brigham Young's marriage to his alleged twenty-seventh wife was declared void, since he had no capacity to marry her, being an already married man at the time of the purported marriage; see New York Times, 28 April, 1877, and Irving, The Twenty-Seventh Wife, op.cit., p.332.

3. The Bill was written by Representative Justin R. Morrell of Vermont, and was passed and signed into law

footnotes 3 and 4 continued .....

bring the existence of this statute to the notice of the presiding Judge. Had he done so, the Court should have had no difficulty in finding that Hyde's marriage was monogamous in law as it was in fact.

It is submitted that the illegal practice by the Mormons did not make such unions polygamous, but rather bigamous.

It is most remarkable that although since this decision Hyde's case has been commented on and followed by judges in all parts of the Commonwealth also including America; and has also been the subject of a number of academic legal essays, the invalidity of the decision has never been established. It is submitted that the decision in Hyde v. Hyde was given per incuriam.

2. Forms of Polygamy

> Ellis says:
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> "The 'polygamy' which some people view today with consternation is mostly, as someone has improperly termed it, merely a 'consecutive polygamy', due to an increased tendency to divorce. That is to say it is simply an enlargement of the familiar monogamy". 1

This statement refers to the modern trend to classify polygamy, and to extend the term to a variety of social relationships. Some of the terms used to describe these relationships are:

Footnotes 3 and 4 continued..... (3) by President Lincoln on 1 July, 1862; 12 Stat. 501. This statute was revised and incorporated in the United States Revised Statutes, par. 5352 "which is a full substitute in every respect for the English statute [of bigamy], except as regards the grade of the offence which is, under the Act of Congress, a misdemeanour"; see C.J.S. 10, Bigamy, para. 2 note 2; Knight v. U.S. 6 App.1.

(4) [1866] L.R., 1 P. and D. 130.

1. Havelock Ellis, Psychology of Sex, (London: William Heineman (Medical Books) Ltd. 1933), 2. 244; See also Eugene Hillman, Polygamy Reconsidered: African Plural Marriage and the Christian Churches, (New York: Orbis Books, 1975), p. 10.

1. simultaneous polygamy;
2. consecutive polygamy;
3. sporadic polygamy;
4. symbolic polygamy.

Many of these forms of polygamy exist in Nigeria and have an important bearing on the status of women. It may therefore be pertinent to indicate briefly the essential nature of each type of these relationships.

(1) Simultaneous polygamy

This is the traditional variety and exists where a person is married to more than one spouse at the same time. He retains a marital relationship with each spouse simultaneously, and invariably, all the parties share a common residence, although they may have separate dwellings. This type of polygamy, as practised by men, was, and to a lesser degree still is prevalent in Nigeria, and as a chief characteristic of customary marriage will be treated in greater detail shortly.

Basically, simultaneous polygamy implies marriage and is thus a legal relationship. As such it is forbidden by the laws of most European countries.[1] A man may however simulate simultaneous polygamy by cohabiting with two women at the same time. He may be married to one or neither of the women. There is evidence that this form of "polygamy" is still practised among the Mormons[2] and is not totally absent from Britain. Recently John Knight, an amateur athlete by profession, was reported[3] as living with two women simultaneously, in Cornwall, England. Previous to the report, the women had shared the same home but the growing size of the combined family forced them to live separately. The women had eight, and eleven children respectively, and were both expecting babies at the time of

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1. But see John Cairncross, After Polygamy was made a Sin: The Social History of Christian Polygamy (London: Routledge and Kegan Paul, 1974); see also below, Pp.309-311.
2. See the "Sunday Times," 19 March, 1978.
3. Daily Mirror, 30 January, 1978, p.11.

the report. He was married to one of the women, and the other woman was referred to as his "Common Law wife". Marriage by mutual consent, unlike the position among the Yorubas previously noted, is not legally valid in England,[1] but cohabitation with two or more women is not unlawful as it was at one time in the United States.[2]

(11) Consecutive polygamy.

This form of "polygamy" is becoming increasingly rife in many societies in different parts of the world, and is displacing simultaneous polygamy in many parts of Africa, especially in the urban areas.[3] Writers use this term to cover situations where the man owes marital obligations to two or more women or their children although

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1. The so-called "common-law marriage" is only recognized in English Law:-
   (i) where there is absence of local formalities for the celebration of a marriage; Wolfenden v. Wolfenden [1945] 2 All E.R.539; [1946] P.61.
   (ii) if it is unreasonable to expect the parties to comply with the lex loci celebrationis in the circumstances, see Bromley, op.cit. p. 27.
   Valid marriages contracted by mutual consent of the parties only was abolished in England by Lord Hardwick's Act, 1753. But see A.N. Allott - "The People as Law-Makers: Custom, Practice and Public Opinion as Sources of Law in Africa and England", 21 J.A.L., 1977, pp.1-23 at p.15. In certain States of the U.S. common-law marriages are still recognized as valid; see 10 Am. Jur. 2d. par. 9; For list of such States see Am. Jur. 2d. Desk Book, Document 124.

2. See above p. 294. During the late 19th century cohabitation with two or more women as "wives" was illegal, see Section 5352 Rev. Stat.; Cannon v. U.S. [1885] 7 Pac. 369.

3. See Alyward Shorter, African Culture and the Christian Church, (London: Geoffrey Chapman, 1973), pp.172-173; Adrian Hastings, Christian Marriage in Africa, (London: SPCK, 1973), p.40; Aidan Southall, "The Position of Women and the Stability of Marriage", Introductory summary in Social Change in Modern Africa, ed. by Aidan Southall, (London: Published for the International African Institute by Oxford University Press, 1961), p.52; Kenneth Little, Urbanization as a social process: An essay on movement and change in contemporary Africa, (London: Routledge and Kegan Paul, 1974), pp.82-84; Ngwobia Uka, Growing up in Nigerian Culture, op.cit., p.15; Kenneth Little, African Women in Towns: An Aspect of Africa's Social Revolution, (Cambridge, England: Cambridge University Press, 1973), pp.107 et.al.

at any one time, he may be living with or married to only one of the women. It is sometimes referred to also as "successive polygamy"[1] and may be practised in a country where monogamy is the legal norm since the essence of the relationship is marital obligations fiscal or physical, owed to two or more women and their children at the same time. As noted by Ellis in the statement above, consecutive polygamy is due to the increasing frequency of divorce in many societies. Adam notes that by "the beginning of the Seventies a new kind of polygamy had been accepted in Britain".[2] She describes its machinery as divorce, separation, single motherhood and unofficial unions. In all these situations, the man involved may still be responsible for the women with whom he previously had sexual relations, although he may not be currently associating with them. The situation may be illustrated by reference to divorce. On the grant of a decree of divorce, nullity, or judicial separation, the court may order either spouse to make unsecured periodical payments to the other spouse. If the husband against whom such an order is made remarries, or cohabits with another woman, he becomes liable to maintain both his former wife as well as his present wife,[3] or mistress.

Instances of consecutive polygamy are numerous in Nigeria. They may occur as a result of divorce, but more often from separation without a divorce. They are evidence of marital instability in the community and in many cases result in considerable hardships for the

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1. See Southall, op.cit. p. 52, who uses the term "successive monogamy" and Uka, op.cit. p.15, who refers to it as "progressive polygyny" and Esther Vilar, The Polygamous Sex: A man's Right to the other Woman, trans. from the German by Sophie Wilkins (London: W.H. Allen, 1976), p.71, who defines such relationships as "successive polygamy".
2. Ruth Adam, A Woman's Place; 1910-1975, (London: Chatto and Windus, 1975) p. 196.
3. Nigerian Matrimonial Causes Decree, 1970, sections 70-73; see also the English Matrimonial Causes Act, 1973, sections 23 and 27(b).

divorced or separated wife. As will be shown later, a woman married under customary law is not entitled to be maintained by her husband after a divorce, or when the parties are separated. The husband's liability to maintain dependent children,however, remains. A woman who is wholly dependent financially on her husband, and who has been divorced or separated from him may be adversely affected, especially in cases where she has no children.[1]

(III) Sporadic Polygamy.

Vilar, in her book, The Polygamous Sex: A Man's Right to the Other Woman , [2] extends the categories of polygamy to include "sporadic polygamy", which she defines as "the occasional irregular indulgence in having more than one woman at a time",[3] and in which a man satisfies his sex drive with women he cannot have on a fixed basis, for example, other men's wives, or women anyone can have, for example, prostitutes. This is but another name for two associations known to mankind from the beginning of time to the present day; associations which no society has been able to eradicate completely - prostitution and adultery. As will be later seen both forms exist in Nigeria.

(IV) Symbolic polygamy.

This term is also coined by Vilars and she uses it to describe the increasing situation found in the United Kingdom, the United States and many European countries, whereby a man's sexual needs may find satisfaction in sexual substitutes such as pornographic films, pictures and books, in addition to having a wife. If the man becomes sufficiently addicted, this can pose a great threat to the position of the wife both financially

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1. See further, Chapter
2. Esther Vilar, op.cit. pp.68-85.
3. Ibid. p.71.

and physically. Sporadic and symbolic polygamy are often the only kinds the average man can afford because of economic reasons. Pornography no doubt exists in some Nigerian cities, for example Lagos, but it is generally insignificant as compared to European countries.

The main form of polygamy that will be discussed in this Chapter is simultaneous polygamy where a man is married to two or more wives and retains marital relationship with each woman.

3. Polyandry

Polygamy may take the form of

1. polyandry, in which a woman has two or more husbands at the same time, or
2. polygyny, the system whereby a man has two or more wives at the same time.

A. Introduction

Westermarck, who conducted extensive studies on the prevalence of polyandry all over the world, notes that "polyandry is a much rarer form of marriage than polygyny".[1] But an examination of the literature cited by him supports the statement of Prince Peter of Denmark, who has made an exhaustive study of polyandry, that "there is more literature in evidence on polyandry than one would at first be led to suppose", revealing "quite a broad distribution of the custom of polyandrous marriage".[2] Although many peoples practise polyandry, in no case is it known to be the exclusive form.[3] Hobhouse, Wheeler, and Ginsberg, who computed the prevalence of polyandry

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1. Westermarck, "History of Human Marriage", op.cit. Vol.III, p.107.
2. H.R.H. Prince Peter of Greece and Denmark, A Study of Polyandry (The Hague: Moulton and Co., 1963), p.56.
3. Westermarck, op.cit. Vol.III, p.155.

according to grades of economic culture, found that it occurs sporadically in all grades, but everywhere as an exception.[1] Crawley notes that polyandry is found sporadically even in Southern Europe.[2]

The practice of polyandry is said to have originated in India: it has been practised principally by priestly and barbarous tribes, who fear most for the increase of their members, which would end in driving them to honest industry.[3] It, however, "reappears in a remarkable manner in the highest state of social civilization, where excessive expenditure is an obstacle to freehold property...."[4]

B. Types of polyandry

Various types of relationships have been described as polyandry. For example, writers include cases in which

(a) children recognize more than one man as having the status of 'true' father.[5]

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1. L.T. Hobhouse, G.C. Wheeler and M. Ginsbergh, The Material Culture of the Simpler Peoples", (London: Chapman and Halls, 1830-1930) p. 163.
2. Edward Crawley - The Mystic Rose: A Study of Primitive Marriage and Primitive Thought in its Bearing on Marriage, 2nd.edit. (New York: Meridan Books Inc., 1927), p. 258.
3. Burton, City of the Saints, op.cit. 522; see also Simon Ottenbergh and Phoebe Ottenbergh, "Social Groupings" in The Study of Africa, ed. by P.M.J. McEwan and Robert Sutcliffe, (London: Methuen and Co. Ltd.1965), p. 42.
4. Burton, City of the Saints, op.cit. p. 522.
5. See Westermarck, History of Human Marriage, op.cit. Vol.III, pp.131-133; Ahmad Shaw, Four Years in Tibet, 2nd. edit. (Benares, 1906) p.52; Mary Tew, "A form of Polyandry among the Lele of Kasai", 21 Africa, 1951, pp.1-12; The institution among the Lele and other groups of the former Belgian Congo was banned by statute; Ordinance of 31 Jan. 1947, Ord. Leg. No. 37, A.I.M.O., Prohibition des pratiques de Polyandrie - an Ordinance of the former Belgian Congo - Tew, op.cit. p.1; Phillips and Morris; Marriage Laws in Africa, op.cit., p.90.

(b) a woman bears legitimate children to several different fathers in succession.[1]

(c) a legitimately married woman regularly cohabits with several men, none of whom rate as father to her children,[2] and

(d) a single legitimate husband allows other men sexual access to his wife.[3]

How far any of these types of relationships may properly be described as polyandrous marriage is debatable. For example, the system where a legitimate husband allows other men sexual access to his wife includes "wife-lending", and cicisbeism (male concubinage), in which the woman has only one recognized legal husband, and her children only one legal father, but her other sexual partners have a respectable status. Meek[4] refers to this practice as

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1. Westermarck, op.cit. Vol.III, p.124; Vinogradoff, Historical Jurisprudence, op.cit. Vol.I, pp.174-175. Cf. Meek, Northern Tribes of Nigeria, op.cit. p. 198, who says that among the Gwari a woman may have several husbands and families in different towns, living now with one, now with another, as she feels inclined. As the children belong not to the first husband but to their natural father it is a fairly close approximation to true polyandry.

2. The classical example of this type of polyandry is reportedly found among the Nayars of Southern India - see Encyclopedia Britanica; Westermarck, History of Human Marriage, op.cit., Vol.III, pp.133-134, for list of literature on the Nayars, and pp.135-142 for a description of polyandry among them; see also Kathleen Gough, "Definition of Marriage", op.cit., p.68; E.R. Leach, "Polyandry, Inheritance and the Definition of Marriage", 55 Man, 1955, pp. 182-186; P.G. Riviere, "Marriage: A Reassessment", in Rethinking, Kinship and Marriage, ed. by Rodney Needham, (London: Tavistock Publications, 1971), p. 69.

3. See Meek, Northern Tribes of Nigeria, op.cit.p. 197; Vinogradoff, Historical Jurisprudence, op.cit. Vol.I, pp.174-175; see also Westermarck, History of Human Marriage, p.154,who reports this type of marriage as found by Thomas in Southern Nigeria.

4. Meek, Tribes of Northern Nigeria, op.cit.p.197.

"sexual communism", and notes that it may be found among many African communities, for example, the Ewe-Speaking Peoples of Dahomey, and the Bahima[1] of East Africa. He gives examples of the practice in Nigeria among the Tiv, where sons cohabit with their fathers' wives when the latter have become old men, and among the Yoruba of Osi and Ekiti, where every male in a compound has access to every female, except in cases of close consanguinity. Sons have access to their father's wives (their own mothers excepted), and even young brides are free to all. Meek also notes that wife-lending is common among the pagan Nomad Fulani even for considerable periods, and that among the Yorubas and Igbos, impotent old men constantly lend their wives to young men in consideration of farm work.[2]

These types of relationships cannot, however, be properly described as polyandry, since in all cases, the woman concerned is married to only one man at any given time. As Radcliffe-Brown correctly points out, "it is not sexual intercourse that constitutes marriage either in Europe or amongst savage peoples".[3] Except, probably, the disputed case of the Lele of the former Belgian Congo, closer examination of all other instances of African polyandry discloses, not the marriage of a woman with two or more men at the same time, but a kind of "sexual communism", in which several men have the right of access to a woman, although she is married legally to only

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1. See also Vinogradoff, Historical Jurisprudence, op.cit. p.5.

2. Meek, Northern Tribes of Nigeria, op.cit. p.200; Meek, Law and Authority, op.cit. p. 276; He describes the relationship among the Igbos as Iko-Mbara; a recognized form of paramour relationship. Talbot records similar practices among many of the other Southern peoples; see Talbot, Peoples of Southern Nigeria, op.cit. pp.429, 441.

3. Radcliffe-Brown and Forde, "African Systems....", op.cit. p. 5; see also George P. Murdock, Social Structure, 1965, op.cit. pp.5-7 esp. p. 6; Bronislaw Malinowsky, "Parenthood, The Basis of Social Structure," in The Family: Its Structure and Functions, ed. by Rose L. Coser, 1964, op.cit. p. 18.

one of them,[1] or "group marriage", - households with several husbands and wives all sharing sexual services.[2]

C. Incidence of polyandry in Nigeria

Most African writers assert the relative rarity of polyandry in Africa,[3] while a few are quite emphatic about its non-existence in Africa. Thus Agbede writes that "polyandry is practically unknown in Nigeria, and one might add that it is not practised anywhere in Africa."[4] How far this statement is accurate depends on the precision

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1. For e.g. the Ibibios as stated by Talbot; among the Atamm Ekol, "a wife is regarded as the property of her husband's age-class, and any man who refuses to allow a member of his 'company' to have access to her is punished", see Talbot, Tribes of the Niger Delta, op.cit. p.202.

2. See the statement of Julius Caesar that the early Britons, in their domestic life, practised a form of community of wives, ten or twelve combining in a group, especially brothers with brothers and fathers with sons. Writers, on the strength of this text have suggested that the community of wives in Britain was polyandrous in origin and can be regarded as a real instance of group marriage - see Julius Caesar, De Bello Gallico, Bk. V.14, 1819, cited by Prince Peter, op.cit. p.59; see also Westermarck, History of Human Marriage, op.cit. Vol.III, pp.226-227; and Vinogradoff, Historical Jurisprudence, Vol.I, op.cit. p.223; Cf. group-marriage in certain Western societies at the present time, see Karl Fleischman, "Marriage by Contract: Defining the Terms of Relationship", 8 Family Law Quarterly, 1974, No. 1, pp.27-49 at p.28; see also Harold Berman, "Soviet Family Law in the Light of Russian History and Marxist Theory", 56 Yale Law Journal, 1946, p. 26 who notes that group-marriage exists in Russia to the present day. Contrast Murdock, Social Structure, op.cit. pp.24-25; R.H. Lowie, Primitive Society (London, 1921), pp.49-62.

3. See David B. Barrett, Schism and Renewal in Africa, (London: Oxford University Press, 1968), p.146; Radcliffe-Brown and Forde, African Systems...",op.cit. p.90.

4. I.O. Agbede, "Recognition of Double Marriage in Nigerian Law", 17, Int. and Comp. Law Quarterly, 1968, pp.735 at p.736. See also Walter Trobisch, My Wife made me a Polygamist, (Illinois: Inter-Varsity Press, 1971), p. 9.

with which polyandry is defined.[1] As far as Nigeria is concerned, there are writers who assert that it does not exist among the Yorubas,[2] in Southern Nigeria,[3] or even in Nigeria,[4] but many of the types of relationships commonly described as polyandry exist in Nigeria, although they cannot be strictly defined as polyandry.[5]

Muller[6] describes a system of marriage among the Rukuba of Benue Plateau State of Nigeria, several miles west of the town of Jos, which seems to justify the description of polyandry, and indeed a similar type of marriage found among the Kadara of Zaria and the Kagoro of Jos Plateau[7] has been classified as true polyandry.[8]

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1. See e.g. J.M. Cooper, Temporal Sequence and the Marginal Cultures, Catholic University of America Anthropological Series, No. X, 1941, pp.52-53; Murdock, Social Structure op.cit., pp.25-26.
2. See e.g. A.K. Ajisafe, Laws and Customs of the Yoruba People, 1924, op.cit. p.61; Edward Ward, Marriage Among the Yoruba, op.cit., p.25; R. Galletti, K.D.S. Baldwin, and I.O. Dina, Nigerian Cocoa Farmers, (London: Oxford University Press, 1956), p.72, n.1.
3. Obi, Modern Family Law, op.cit. p.380.
4. I.O. Agbede, op.cit. p.736; O. Achike, "Statutory and Customary Marriage", op.cit. p.49.
5. See e.g. Meek, Northern Tribes of Nigeria, who reports the Zaga marriage found among the Gwari, Kamberi and Tiv, where the women have several husbands and families in different towns, living now with one, now with the other, as she feels inclined. As the children belong not to the first husband but to the actual father, there is a fairly close approximation to true polyandry - see p. 197.
6. Jean Claude Muller, "Of Souls and Bones: The Living and the Dead among the Rukuba, Benue Plateau State, Nigeria", 46 Africa, 1976, No.3, pp.258-273 at p.259.
7. M.G. Smith, "Secondary Marriage in Nigeria", 23 Africa, 1953, pp.298-323.
8. Prince Peter, A Study of Polyandry, op.cit. p.507.

Muller describes the system among the Rukuba thus:

> The tribe is bisected, for marriage purposes, into two exogamous moieties. Residence is patri-virilocal; villages can belong exclusively to one or the other moiety, or some members of the village may be from one moiety and others from the opposite moiety. In the latter case the chief is always from the more numerous moiety found in the village, the less numerous one having no political rights and duties and supplying only a ritual assistant to the chief. Each of those villages belonging exclusively to one exogamous moiety constitutes, within the total marital structure, what I call a wife-taking unit. Those villages comprising members of both moieties form at least two wife-taking units: in such cases the more populous wife-taking unit is led by the village chief, and one or more additional wife-taking units, depending on circumstances, are formed by members of the opposite moiety. The wife-taking units of opposite moieties marry each other's girls in primary marriage, i.e. the first marriage of a girl; and the wife-taking units of the same moiety take each other's wives, i.e. girls married in primary marriage from the opposite moiety, in secondary marriage. A woman can thus be married to several men of differing wife-taking units; she cohabits with one husband at a time but her different husbands all keep some rights in her. Thus it may be said that wife-taking units of opposite moieties are daughter-givers and daughter-takers to each other; whereas wife-taking units of the same moiety are wife-givers and wife-takers to each other.[1]

It can be seen from this description that a woman may be married to two or more men at the same time, and each husband has some rights over her. Although she cohabits with only one husband at a time, cohabitation is not a necessary incident of marriage, and in many polygynous marriages in Nigeria, especially among the Yorubas, the husband and his several wives may not cohabit, at least in the sense of living in the same household.

Apart from this practice among the Rukuba, Kadara, and Kagoro, and a few isolated practices which may simulate the features of polyandry, it may be said that the practice of polyandry does not exist among the tribes of Nigeria. The unfortunate reporting of the case of

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1. Muller, op.cit. p. 259.

Ohochuku v. Ohochuku,[1] which has created the erroneous impression that polyandry is permitted by the customary laws of the Igbos is not substantiated by available evidence.

4. Polygny

A. The Historical perspective of polygyny

As previously noted, polygyny is the system in which a man is married to more than one woman at the same time. In accordance with popular usage, the term polygamy will generally be used, instead of the more linguistically correct polygyny, to designate this practice, but the latter term will be retained wherever it may aid clarity.

Contrary to African belief, the practice of polygamy is not confined to Africa and Asia.[2] The erroneous belief that polygamy originated in Africa and Asia, and is only to be found there, was created by the hostile reaction of the early Missionaries to African polygamy. The Missionaries, ignoring their own cultural and Scriptural background, consistently and persistently opposed and attacked polygamy. They referred to the institution by repellent epithets, and made depreciatory comparisons between polygamy and monogamy in which the former emerged as desirable and divine, while the latter was represented as a pernicious, licentious institution, a peculiar preserve of the barbarous Africans. Thus Waddell, in his defence of monogamy, says of polygamy:

> "...polygamy and its companion, concubinage, prevail in Calabar, while marriage, properly so called, is unknown...people are apt to confound heathen and Christian wives and marriages, and reason concerning them as if they were quite the same. We have seen how different they are at Calabar and learn from missionaries in Natal how different they are in that colony. The polygamy

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1. [1960] 1 All E.R. 253 at p.254; see further Chapter XI below.
2. See L.T. Hobhouse, G.C. Wheeler, and M. Ginsberg, The Material Culture and Social Institutions of the Simpler Peoples, (London: Chapman and Halls, 1930), p.161-163, esp. p. 163; L.H. Morgan, Systems of

footnote continued.....

> there is described as a horrid system of vileness and oppression, utterly contrary to any scriptural view of the Christian system...they [women] are not contracting parties in heathen and Mohammedan countries; but the victims of avarice, lust, or power..."[1]

Time has not entirely obliterated this attitude to polygamy, and although a more sympathetic approach is now advocated,[2] the old attitude to African polygamy lingers. For example, modern writers on polygamy, even those with a religious bias,[3] fail to mention Mormon polygamy, which has a religious basis, and portrays parallel features and incidents to those of African polygamy.

Available literature shows that, apart from a few communities which have been recorded as entirely monogamous, for example, the Veddas of Ceylon,[4] most of the Negritos of the Philippine Islands, some of the Central African pygmies, and some of the aboriginal tribes of South America and the Malay Peninsula,[5] polygamy numbers among its practitioners, at various periods of their legal history, the overwhelming majority of the peoples of Asia and Europe.

The Greek and Romans are represented by most writers as strictly monogamous,[6] but Bryce notes that a

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Footnote 2 continued.....Consanguinity and Affinity of the Human Family, (Washington: Smithsonian Contributions to Knowledge, 1871) Vol. XVII, p.476-477.

1. Hope Masterton Waddell, Twenty-Nine Years in the West Indies and Central Africa; A Review of Missionary Work and Adventure 1829-1858,2nd.edit. (London: Frank Cass and Co. Ltd. 1970), pp.667-672.
2. See Adrian Hastings, Christian Marriage in Africa, op. cit. pp.77-78; Eugene Hillman, Polygamy Reconsidered,op. cit. pp.205-208; Alyward Shorter, African Culture and the Christian Church, op.cit. pp.176-177.
3. See e.g. Hastings, op.cit., Hillman, op.cit.; Shorter, op.cit.; see also D.W.T. Shropshire, Primitive Marriage and European Law; A South African Investigation,(London: Frank Cass and Co. Ltd. 1970); Cf. Cairncross, After Polygamy was made a Sin, op.cit., pp.165-200.
4. Westermarck, History of Human Marriage, Vol.III, op.cit. pp.12-16.
5. Margaret Mead, Male and Female, op.cit. p. 189.
6. Westermarck, History of Human Marriage, Vol. III, op.cit. pp. 49, 50.

form of concubinage, superadded to lawful marriage, was not unknown, especially among the Greeks.[1] Countries which formerly practised polygamy include China, Japan, and Arabia. Polygamy was also permitted amongst most Indo-European peoples - the Slavs and Teutons; the ancient Irish, the Hindus, and even in Christian Europe. Although there is no direct evidence of polygamy among the Anglo-Saxons, it could not have been entirely unknown, as it is prohibited in some of their law books.[2]

The Jews permitted and practised polygamy at the beginning of the Christian era, and in 212 A.D. the lex Antoniana de civitate, while re-affirming the law of monogamy for Roman marriage, tolerated polygamy among the citizens who were Jews.[3] Among Western Jews, polygamy was forbidden about the twelfth century, but among Eastern Jews it survived to some slight extent into very modern times.[4]

The practice of polygamy by the old patriarchs of the Bible is too well-known to need reiteration and mention need only be made of Abraham,[5] Jacob,[6] David and Solomon as outstanding examples.

Polygamy has not been entirely absent among modern Christians. Martin Luther, as the Mormons point out, treated polygamy with toleration, if not approval,

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1. Bryce, Studies in History and Jurisprudence, op.cit. p.784; Hastings, Christian Marriage in Africa, op.cit.p.8.
2. Westermarck - History of Human Marriage, op.cit.Vol.III, pp.38-51; see also Harold Berman, Soviet Family Law, op.cit. pp.42-43.
3. Hastings, Christian Marriage in Africa, op.cit.pp.6-9; Hillman, Polygamy Reconsidered, op.cit.pp.18-27; Burton, City of the Saints, op.cit.p.59.
4. Hillman, op.cit. pp.20-21; Hastings, "Christian Marriage..." op.cit. p.7.
5. Book of Samuel, Chapter 10, verses 7-12.
6. Book of Genesis, Chapters 16, verses 3 and 25, verses 1-6.

and with the sanction of the Lutheran Clergy, affirmed the bigamy of Philip of Hesse and Frederick William of Prussia. In 1531, the Anabaptists openly preached at Munster that he who wants to be a true Christian must have several wives,[1] and "certain British dissenters of the Royal Burgh of Dundee who in our day petitioned Parliament for permission to bigamise", was noted by Burton in 1861.[2]

From the foregoing examples of the prevalence of polygamy, it is obvious that it was not confined to Africa. Why then has polygamy been regarded as almost synonymous with African marriage? Although polygamy has been practised widely in some countries and more conservatively in others, it is in Africa that polygamy is found at its height, both in points of incidence and intensity.

B. The practice of polygamy in traditional African societies

Many kings and chiefs in traditional African societies had a large number of wives. King Mtessa of Uganda is said to have had 7,000 wives, and a similar number is accredited to the king of Loanga. "This is to my knowledge", says Westermarck, "the high-water mark of polygamy anywhere".[3]

In Nigeria, the king of Benin is reported by Landolphe as having had 600 wives and concubines, "while the noblemen have often some eighty or ninety or even more and there is no man so poor that he has ten or twelve wives at the least"; while Dapper says: The king has a

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1. Westermarck, History of Human Marriage, op.cit. Vol. III, pp.50-51.
2. Burton, City of the Saints, op.cit.; Cairncross, op.cit. pp.9-22; 31-52.
3. Westermarck, History of Human Marriage, op.cit. Vol.III, p.21.

great number of wives, actually more than a thousand.[1]

Oldfield, who visited Idah in Nigeria in 1833, stated that, "There are about a hundred and twenty houses, enclosed by a wall a few feet high in which Attah's [the King of Idah] favourite wives reside, the whole number of which exceeded two thousand".[2] An Igbo king who was visited by McWilliam in 1841, was reported as having only 110 wives in contrast.[3] It is interesting to note the statement of Bowdich who visited Ashantee in the early nineteenth century, that "the laws of Ashantee allow the king 3,333 wives, which number is carefully kept up, to enable him to present women to those who distinguish themselves, but never exceeded, being in their eyes a mystical one".[4]

There is no doubt that some of these alleged number of wives are greatly exaggerated, but the level of polygamy among kings, chiefs and other wealthy men was remarkably high. This extreme appetite for marriage possessed by kings and chiefs has led to the belief that all men had a great number of wives, but the evidence shows that a significant number of men in the traditional society were in fact monogamist.[5]

Although polygamy in Africa may be regarded as culturally normative[6], it was by no means universally

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1. As quoted by Ling Roth, Great Benin, Its Custom Art and Horrors,(London: F. King and Sons, 1903), p.37.

2. MacGregor Laird, and R.A.K. Oldfield, Narrative of an Expedition into the Interior of Africa by the River Niger, (London: Richard Bentley, 1837), p.190.

3. James Ormiston McWilliam, Medical History of the Expedition to the Niger, during the Years 1841-2, (London: John Churchill, 1843).

4. Edward Bowdich, Mission From Cape Coast to Ashantee, (3rd. edition, (London: Frank Cass, 1966), p.290; see also Leighton Wilson, Western Africa,(London: 1856), p.180.

5. See Joseph Mullin, The Catholic Church in Modern Africa: A Pastoral Theology (London: Geoffrey Chapman, 1965), p.10; Hastings, Christian Marriage in Africa,p.29; Isaac Schapera, Married Life in an African Tribe, (Pelican Books, 1971), p.87; J.J. Freeman, A Tour in South Africa (London: 1851), p.280; C.K. Meek, A Sudanese Kingdom: An Ethnographical Study of the Jukun-Speaking Peoples of Nigeria (London: Kegan Paul,

footnotes 5 and 6 continued.....

practised in actual fact.[1]

C. The determinants of polygamy

A variety of reasons has been advanced as tending to make polygamy a necessary, desirable and preferable system of marriage, and it is necessary to examine some of the determinants of polygamy in order to see how far they still exist in modern society, before discussing the present practice of polygamy in Nigeria.

The factors conducive to polygamy can be summarised under three main causes:-

(1) men's desire for numerous wives;
(11) the unequal numbers of men and women in a society; and
(111) the need to provide for widows under the levirate and analogous systems.

(1) Men's desire for numerous wives

The motives controlling a man's desire to multiply his wives are many, and one or more may prevail in inducing him to found a harem. Thus, he may be actuated by:

(a) a desire for numerous progeny;
(b) a desire for enhanced economic and social status;
(c) the need to cater for periodical continence;
(d) the attraction which female youth and beauty exercise upon men;
(e) a taste for sexual variety.

(a) A desire for numerous progeny:

In the traditional African society children

Footnotes 5 and 6 continued..... Trench, Trubner and Co. Ltd. 1931), p.195.

6. For definition of a society which could be regarded as a "culturally normative" polygamous community, see George Murdock, Social Structure, op.cit. pp.27-28.

1. Older informants in the communities visited during field-work were positive that not only were there many men who had only one wife, but quite a few were never able to marry at all, because of poverty, even in traditional society. See further Tables 4:1 and 4:2, below.

were highly valued, and were regarded as the fundamental component of an economically secure household.[1] Economic production activities were labour intensive, and the larger the family unit, the greater were the possibilities of wealth and social prestige. The first responsibility of a wife was therefore to produce children. If a marriage did not result in children who grow to maturity, the woman was held responsible, mercilessly teased by other women[2] and sometimes divorced. The stigma attached to barren women has been previously noted,[3] and to this may be added Nadel's observation among the Nupe to whom "marriage has no real meaning without progeny". Barrenness is regarded as a great curse and misfortune, and many cults and forms of magic are designed to secure fertility of the women or to cure barrenness".[4] Lander recounts the plight of the old wife of the Fulani Governor who, married for thirty years still had no children. She begged him piteously for medicine to "promote and assist her accouchement".[5]

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1. See Eileen Jenson Krige, "Changing Conditions in Marital Relations and Parental Duties Among Urbanised Natives", 9 Africa, 1936, pp.1-23 at p.1.
2. See the story of the old Tiv woman recounted above, Chapter III. see also Uka, Growing Up in Nigerian Culture, op.cit. pp.35-38, a childless woman stands the risk of being disgraced by other women and ridiculed by co-wives in a polygamous household.
3. See above Chapter III, p.198.
4. S.F. Nadel, A Black Byzantium: The Kingdom of Nupe in Nigeria, op.cit. p.154; see also Akiga, Akiga's Story, op.cit., p.312; Evans-Pritchard, The Position of Women in Primitive Societies, op.cit. pp.46-47; Sylvia Leith-Ross, African Women: A Study of the Ibo of Nigeria, (London: Routledge and Kegan Paul Ltd., 1939), Reprint, 1965), p.270; Uchendu, The Igbo of South Eastern Nigeria, op.cit.p.57; Richard Henderson, The King in Everyman: Evolutionary Trends in Onitsha Ibo Society and Culture, (New Haven and London: Hale University Press, 1972), pp.231-232.
5. Richard Lander and John Lander, Journal of an Expedition to Explore the Course and Termination of the Niger, Edit. and Abridged by Robin Hallett, (London: Routledge and Kegan Paul Ltd. 1965), p.98; see also William Bosman, A New and Accurate Description of the Coast of Guinea, Divided into the Gold, The Slave and the Ivory Coasts, op.cit., "the fruitful woman is highly valued, whilst the barren woman is despised".

This desire for children, "particularly boys, the labour force and inheritors of his herd",[1] among the Fulani, has not changed in its effect on the status of women, since Lander's visit in 1830. Stenning in 1952-1953, found evidence to show that

> "during the course of her marital history unduly lengthy intervals between birth of her children may bring divorce upon her...Male sterility which in fact may be the cause of such intervals is not recognized by Pastoral Fulani men and may result in the divorce of a woman by her husband".[2]

Failure to produce children, or male children specifically, is a common reason for additional wives, and among various peoples polygamy is practised or permitted only when the first wife is barren or has no male offspring.[3] This of course implies, and demonstrates the widely held belief, especially in Africa, that the wife is responsible for the failure to propagate, and also for the failure to produce male children. These beliefs have no scientific basis, and it has been conclusively proved that sterility is not the prerogative of women. Men are equally prone to infertility.[4]

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1. See Derrick Stenning, "Household Viability Among the Pastoral Fulani" in The Development Cycle in Domestic Groups, edit. Jack Goody, (London: Cambridge University Press, 1958, Reprint, 1971), p.105.
2. Stenning, op.cit. p.106. This phenomenon is not peculiar to Africa, see further below; Chapter XI.
3. See Westermarck, History of Human Marriage, op.cit. p.76; Genesis, Chapter 16; Abraham's wife Sarai bore him no children so she gave him Hagar, her handmaiden to be his wife; see also R. Thurnegsen, Studies in Early Irish Law, (Royal Irish Academy, 1936), sterility of the wife is a justification for polygamy among the ancient Irish.
4. See George Gellhorn, "Non-Operative Treatment in Gynecology", Gynecological and Obstetrical Monographs, 1924, Vol.V, p.252; Fritz Khan, Our Sex Life, (London: Heineman, 1953), pp.211-212; L.J. Ludovici, The Final Inequality: A Critical Assessment of Woman's Sexual Role in Society,(London: Frederick Muller Ltd. 1965), p.47; Josephine Langstaff, Adam's Rib, (London: George Allen and Unwin Ltd., 1954), p.63.

As a result of ignorance of the biological facts, compounded by male egoism and arrogance, childless women continue to suffer in Nigeria. Numerous writers provide evidence of the cruel treatment meted out to Nigerian women because of their infertility.[1]

It is significant that no taint is attached to the barren man in Nigeria. In fact the term barren is reserved for women, and wherever it becomes necessary to mention the man's infertility, the less emotive word "sterile" is used. The barren man does not exist in Nigeria. As one male writer discovered,

> "A man's own infertility is characteristically, not believed to enter into the question. Male sterility is not recognized; there must be a woman, somewhere, by whom a man can have children. Social institutions support this; a man may acquire a family through the clandestine adulterous relations of his wife..."[2]

If a wife who has no children refuses to engage in an adulterous relationship in order to produce children for her husband, at his or his relative's bequest, she may be divorced and replaced with a more compliant wife.[3] This allegedly occurred in the case of Ogbogu v. Ogbogu,[4] a

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1. See authorities cited in Note 4 p.314; see also William H. Clarke, Travels and Explorations in Yorubaland 1854-1858, op.cit. p.305; Alexander Leighton, et.al. Psychiatric Disorder among the Yoruba, (Ithaca, New York: Cornell University Press, 1963), pp.47-48; Ward, Marriage Among the Yoruba, op.cit. p.30; T.J. Bowen, Central Africa: Adventures and Missionary Labours in Several Countries in the Interior of Africa, 1849-1856, op.cit. p.305.
2. Stenning, "Household Viability Among the Pastoral Fulani", op.cit. p.111; see also Leith Ross, African Women, op.cit., p.270.- Potency is confounded with fertility and if a man is potent he assumes that he is fertile; Leighton et.al. "Psychiatric Disorder...", op cit. p.50; Richard Henderson, The King in Every Man, op.cit. p.214; Ekundare, Marriage and Divorce...", op.cit. p.36.
3. See Leith-Ross, op.cit. p.270; Henderson, op.cit. p.214.
4. [1972] Suit No. O/8D/71, unreported, Onitsha High Court, 13 April, 1972.

divorce case heard in the Onitsha High Court in 1971. The parties were married in 1961, and for six years of the marriage the wife had no children. The wife alleged that the husband suggested that "she tried elsewhere in the matter of her having a child, which base suggestion she refused". As a result, he refused to have sex with her from 1967, and also refused to eat food cooked by her. He purported to "marry" another woman who got three issues for him". Perhaps the second woman was more amenable to his "base suggestion".

The wife who accepts such suggestions, or makes efforts to cure her sterility is not free from jeopardy. In the first case, especially if failure follows her efforts, she may be accused of adultery. In the second case she may be accused of practising witchcraft or juju. For example, in Obi v. Obi,[1] a case decided in 1974, the husband accused the wife of practising juju, but the wife claimed that the juju was given to her to "cool her womb", and to cure her barrenness.

The alleged sterility of women has led to innumerable divorces and the separation of spouses, and is a contributing cause of prostitution. Nadel traced among the Nupes an ideological association between female sterility and sexual licence:

> "As the barren woman fails by the common standard of marriage and womanhood, she is also exempted from the standards of common morality. Adultery and unchastity count less in her than in other women. And although the stigma of immorality would still attach to the unchaste barren woman (she would still be called a 'worthless woman'), it would be, as it were, overshadowed by and fused with the other paramount stigma of barrenness itself."[2]

Of thirty-nine divorce cases heard in the Onitsha

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1. [1975] Suit No. O/8D/74, unreported, Onitsha High Court, 26 September, 1975; see also Nnoli v. Nnoli [1969] Suit No. O/3D/69 (unreported), Onitsha High Court.

2. Nadel, Block Byzantuim, op.cit. p.154; Stenning, "Household Viability Among the Pastoral Fulani", op. cit. p.107. Of 70 prostitutes interviewed in Accra, Ghana, in 1958, only 31 of them had children, 16 having only one child each, - see Ione Acquah, Accra Survey, (London: University of London Press, 1958), p.73.

High Court during the last few years, twenty-five of the wives involved either had no children, no male children, or one male child only. In eleven cases the wife had no children. In all the cases the alleged sterility of the wife was a contributing factor in the breakdown of the marriage.[1]

One wonders how many of these wives were truly barren, or were simply victims of custom or their biological plight. For example, a woman in traditional society was completely ostracized during her menstrual periods,[2] and intercourse during menstruation continues to be totally unacceptable to the large majority of people, yet some rare cases of sterility were cured by the discovery that the particular women were fertile only during menstruation. Told to disregard their scruples all conceived successfully.[3]

Again, men may conceal their barrenness by the biological facts which enable them to claim other men's children as their own. Women, however, are unable to do so.

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1. These marriages were statutory marriages and sterility of the wife is not a ground for divorce. In many customary law systems, protracted sterility of the wife may be a ground for divorce, see, Oluwasola v. Gina Adewole [1959] Grade B Customary Court, Ilesha, Case No. UBD 272/59 and Esther Akande v. Karimu Apero [1962] Grade B Customary Court, Egba Odede, Civil Record Book, No.12, p.11, and other cases where divorce was granted because of the wife's sterility, cited by Ekundare, Marriage and Divorce, op.cit. p.36; see also R.E.Dennett, Nigerian Studies or the Religious and Political System of the Yoruba, (London: MacMillan and Co.Ltd. 1910),p.37.

2. M. Green, Igbo Village Affairs, Chiefly with Reference to the Village of Umueke Agbaja, op.cit. pp.176-177; Osman Newland, West Africa (London: Daniel O'Connor, 1922), p.159; Paul Bohannan, Africa and Africans (Garden City, New York: The Natural History Press, 1964), p.161; Basden, Niger Ibos, op.cit., p.62.

3. See Boris B. Rubenstein, "The Vaginal Smear, Nasal Boody Temperature Technic and its Application to the Study of Functional Sterility in Women", Endocrinology,V, 1940, No. 27, p.855.

Paradoxically, a woman's ability to bear children, which places her in an advantageous position in some respects, acts as a handicap in others. For example, it is possible for every mother to know her own child, but because of this advantage she suffers the disadvantage of being unable to fabricate claims to maternity. She has to prove her facundity by parturition. Evidence of her maternity endures for a number of months, and culminates in the actual delivery of a child from within her own womb. On the other hand, the participation of a man in the production of a child is momentary, and, in conformity with social norms, is never an ouvert act. A man, in most cases, is unable to prove his paternity of a child, but because of this, he can make spurious claims to paternity and shift the burden of proof to whoever disputes his paternity, a difficult and sometimes impossible task.

Another misconception entertained about women is inherent in the myth that they are solely responsible for female births, and that if a man who has only female children finds the right woman, he will automatically get male children. Geneticists and physiologists have established facts to the contrary.[1]

The desire for many children is rendered ineffectual by the high mortality rates in tropical

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1. See Havelock Ellis, Psychology of Sex, op.cit. pp.7-9; Germaine Greer, The Female Eunich, (London: Paladin, 1976), pp.25-29; Elizabeth G. Davis, The First Sex, (London: Penguin Books, J.M. Dent and Sons Ltd. 1973), pp.33-35; Shirley Weitz, Sex Roles, Biological, Psychological and Social Foundations, (London: Oxford University Press, 1977), p.19; C.O. Carter, "Sex Linkage and Sex Limitation", and P.E. Polani, "Errors of Sex Determination and Sex Chromosome Anomalies", in Gender Differences: Their Ontogeny and Significance, edit. by Christopher Ounsted and David C. Taylor, 1972, at pp.1-12 and 13-39 resp.

Africa,[1] and many wives are necessary to produce the large number of children required.[2] But to what extent was the multiplication of wives productive of numerous offspring? How far do facts accord with theory?

There is abundant evidence to show that while polygamy increases the number of children generally, it does not do the same for the women involved. "Most writers, both official and unofficial, who take note of the relationship between polygamy and fertility agree that polygyny results in fewer children born".

For example, Basden notes that the "paucity of children in polygamous households among the Ibos is notorious - the theories being completely upset by the facts, and gives examples culled from among his acquaintances.

> "A. has nine wives; from all of them but one daughter survives. B. has probably twenty (the Ibo has a rooted objection to stating exact numbers, all he will answer is "some", "few", "many"), wives; only one sone bears his name and a few daughters. C. has several wives - no son at all, and only about as many daughters as there are wives. D. has more than three wives, but only one child. E. has five wives with three children between them. F. has as many wives as his compound can accommodate, but only three sons, and they are of a degenerate type, indeed, which no form of imprisonment or flogging has been able to subjugate".[3]

This evidence was confirmed, not only among the Igbos, but among other Nigerian communities, from the geneologies of persons interviewed by the present writer

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1. See John C. Caldwell, and Chukuku Okonjo, eds., The Population of Tropical Africa,(New York: Columbia University Press, 1968), p.11; Ansley J. Coale, Estimates of Fertility and Mortality in Tropical Africa", in The Population of Tropical Africa,edit. by Caldwell and Okonjo, op.cit., p.106; A.J. Coale and F. Lorimer, "Summary of Estimates of Fertility and Mortality" in The Demography of Tropical Africa,edit. by William Brass, (Princeton: Princeton University Press, 1968), pp.157-161; see T.J. Bowen, Central Africa, op.cit. p.305. Infant mortality in the rural areas of Nigeria has been documented at 300 per 1000 - see John Bryant; Health and the Developing World,(London: Cornell University Press, 1969), pp.50-51; Basden, Ibos of Nigeria,op.cit.pp.102-103 and Basden, Niger Ibos,p.236.
2. See Jomo Kenyatta, Facing Mount Kenya: The Tribal Life of the Gikuyu,(London: Secker and Warburg,1938), p.1; Hill and Allen, Mormonism and American Culture,op.cit.p.108; Werner, Brigham Young,op.cit.p.341.
3. Basden, Among the Ibos of Nigeria, op.cit. pp.102-103.

during fieldwork. For example, the head labourer at the Shehu Garbai primary school in Maiduguri, Baba, as he was popularly known, a Kanuri, had twelve wives. He had no children alive at the time of the writer's stay in Maiduguri, and since he was well over fifty years old, was at the point of despair at ever having a living child.[1]

These and other numerous examples[2] merit the observation of Reade, writing of Equatorial Africans in 1863:

> "Propagation is a perfect struggle; polygamy becomes a law of nature; and even with the aid of this institution, so favourable to reproduction, there are fewer children than wives".[3]

Of twenty-three studies analysed by Dorjahn, only five show polygamously married women to have been as fertile as, or more fertile than, the monogamously married segment.[4]

The published data thus indicate that the hypothesis is true, and that polygamy does have a lowering

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1. News was received later from Maidugari that a son had been born to him at last by his twelfth wife. Unfortunately, although the son is alive, the mother died during his birth.

2. See Laird and Oldfield, Narrative of an Expedition, op.cit. Vol.I, p.225, who quote the case of an elderly Chief who died leaving fifteen wives and no children; McWilliam, Medical History of the Expedition to the Niger... op.cit. p.63, who compiled a list of seven Igbo men who had a total of sixty-one children produced by thirty-four wives. Forty of the children were dead at the time of his visit in 1841; Hill and Allen, Mormonism and American Culture, op.cit. p.108; Joseph Smith, the first President of the Mormon Church, had no children by his forty-nine or more wives, while Brigham Young, the second President fathered fifty-six children, approximately one for each wife. Cf. James E. Smith and Phillip R. Kunz, "Polygyny and Fertility in Nineteenth-Century America," Population Studies, 1976, No. 30, pp.465-480.

3. Winwood Reade, Savage Africa (London: 1863), p.242.

4. Vernon R. Dorjahn, "The Factor of Polygyny in African Demography", in Continuity and Change in African Cultures, edit. by William Bascom and Melville J. Herskovits, 1959, (Chicago: University of Chacago Press, 1959, 9th. Imp. 1975), p.110.

effect on fertility.[1]

There is little evidence that the desire for numerous children is a contributing factor to the practice of polygamy in present day Nigeria. Although the desire for numerous children still exists to some extent it is not so intensive as to propel a husband into marrying many wives, except where the first wife is barren or only has female children. Pure water supply, improved sanitation and medical facilities in towns have reduced the toll on young children and make it unnecessary for twelve children to be born in order to rear four or five. Economic pressures contribute to the growing realization in Nigeria that the smaller the family, the greater the opportunities parents can offer their children, and that fewer children and more material wealth enhance their social stature more than many children, poorly educated, with a low level of living.[2]

In answer to the question as to what the size of the ideal family in Nigeria should be, most people stated four to six children, and many people, especially men, said personally they did not want more than three or four children. On the other hand, no one stated that he or she did not wish to have any children.

(b) A desire for enhanced economic and social status

In the traditional African society, polgamy was correlated with prestige and wealth. Wealth was exhibited, not by possession of land or other property, but by family size - numerous wives and children acting in turn as producers of further wealth. "Women and slaves constitute

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1. See Burton, The City of the Saints, 1861, op.cit. p.521; Paul Bohannan, Africa and Africans, op.cit. p.161; H.C. Trowell, The Passing of Polygamy: A Discussion of Marriage and Sex for African Christians,(London: Oxford University Press, 1940), p.9; - "This is the strange contradiction of polygamy; it promised many children, it produced few".

2. Allan Mountjoy, Industrialisation and Under-developed Countries,2nd. ed. (London: Hutchison University Library, 1966), p. 76.

the wealth of an African", is a well-known statement.[1] Ward, writing of the Yoruba says that a man's status is not usually judged by his wealth in land or house property...As a rule only by showing that he has a number of wives can be convince his neighbours that he is somebody."[2] Among kings and chiefs the matter is much the same, "title is not a criterion of status or respect from subjects, but the size of the harem nearly always is". He gives the example of a chief with 205 wives who "loomed larger in the eyes of his countrymen", than their king (of Ondo) who ruled over 60,000 persons, but only had 75 wives.[2]

Similar statements have been made for other tribes[3] and it can therefore be accepted that generally, the possession of many wives and children was the status symbol of wealth and social prestige.[4] The prestige to some extent was shared by the wives, especially the first one. "To be the one and only wife is humiliating. It is a sure indication that her husband is a poor man. She

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1. Mary H. Kingsley - West African Studies, op.cit. p.438.
2. Ward, Marriage Among the Yoruba, 1937, op.cit. p.29.
3. Leonard, The Lower Niger and Its Tribes, 1906, op.cit. p.442; Lieber, Efik and Ibibio Villages, 1971, op.cit. pp.44, 47; Basden, Niger Ibos: A Description of the Primitive Life, Customs and Animistic Beliefs etc., op.cit., p.228; William Bascom, The Yoruba of South Western Nigeria,1969, op.cit.,pp.63-64; Nadel, A Black Byzantium, op.cit. p. 358; Alyward Shorter, African Culture and the Christian Church, 1974, op. cit. p.173, notes that because of the prestige of polygamy it was often forbidden for a commoner to have more wives than the Chief or king; see also generally Westermarck, The History of Human Marriage, Vol.III, op.cit., pp.82-84.
4. See Edet Akpan Udo, The Methodist Contribution to Education in Eastern Nigeria, 1893-1960, Ph.D. dissertation, Boston University Graduate School, 1965, p.35; Barrett, Schism and Renewal in Africa op.cit. p.117.

would rather be the mistress controlling a number of other women than be a person of no importance....She has more honour and respect from the community, freedom from loneliness and domestic helpers at her beck and call".[1]

Wives and children were not only symbols of prestige, indicative of wealth, but they were also a fruitful source of economic gain, as they were invariably the creators of wealth.

With a few exceptions, for example, the Fulani in the North and a few riverine communities who traditionally engaged in fishing, most traditional Nigerian societies were based on a farming economy.[2] Before 1939, there was virtually no manufacturing industry in Nigeria. Cotton was partially processed, and cigarettes were manufactured at Ibadan, but there was very little else.[3]

Many communities depended heavily on the labour of women and children on the farms. For example, the Igbos traditionally engaged in farming and most of the farm work was performed by women.[4] "Native agriculturists"

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1. Basden, Niger Ibos, op.cit. p. 231.

2. See Ukandi Godwin Damachi, Nigerian Modernisation, (New York: The Third Press, J. Okpaku Publishing Co. Inc., 1972); also Nadel, A Black Byzantium, op.cit. p.330.

3. B.W. Hodder, Economic Development in the Tropics, 2nd. ed. (London: Methuen and Co. Ltd., 1973), p.183. In 1929, the Colonial Development Act was enacted, and the formal declaration of the British Government's intention to help its dependencies to attain internal sufficiency was later implemented. Since 1948, there has been a rapid growth of factory industry, though at present Nigerians tend to prefer to invest in trade, see Louis Zerby and Margaret Zerby, If I should Die Before I Wake; the Nsukka Dream, (Mitchigan: Mitchigan State University, 1971), p.12; Bowen, Central Africa, op.cit. p. 307; Ward, op.cit., p.34.

4. See Gustavus Vassa Equiano, Equiano's Travels, op.cit. p.93; Green, Igbo Village Affairs, op.cit. pp.169-177; Leith-Ross, African Women, op.cit. pp.197, 228, 241, 244.

says Basden, depend almost entirely on their wives and families for manual labour; the peasant farmer would be sadly crippled without his wageless staff of workers.[1] Although Yoruba women generally did very little farm work,[2] the wives of farmers usually carried the farm produce to the market, a valuable contribution which enabled their husbands to make a profit in cases where none would have been made, if they had to depend on paid labour, a scarce commodity in a subsistence economy where land was freely available to everyone.[3]

The need for many wives as a source of labour is considerably reduced in modern Nigeria, even in the rural areas. Agriculture is becoming increasingly mechanized, and the subsistence sector of the economy is to a large extent eroded by changes in technique of production.[4] The economic participation of women has shifted from agriculture to trade, and to a lesser extent, to occupations requiring education and skill.[5]

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1. Basden, Niger Ibos, op.cit. p.238; see also Meek, Northern Tribes of Nigeria, op.cit. p.233, for a similar statement about some Northern Tribes.

2. See Bowen, Central Africa, op.cit. p.306; W.B. Schwab, "Continuity and Change, in the Yoruba Lineage System", in Black Africa: Its Peoples and Their Cultures Today, edit. by John Middleton, (London: MacMillan and Co., 1970), p. 161; Bascom, The Yoruba of South-Western Nigeria, op.cit. p.24.

3. Ward, Marriage Among the Yorubas, op.cit. p.34; see also Remi Clignet, Many Wives, Many Powers: Authority and Power in Polygynous Families, (Evanston: Northwestern University Press, 1970), p.22; Murdock, Social Structure, op.cit. p.36; A.B. Ellis, West African Sketches, (London: Samuel Tinsley and Co. 1881), p.40.

4. See Pius Okigbo, "Social Consequences of Economic Development in West Africa", op.cit. p.417.

5. David Lucas, "Women in the Nigerian Labour Force" in Population 70, p.486.

The cyclical situation occurs, wherein numerous wives who do not possess adequate qualifications for procuring employment in the urban areas can be a source of embarrassment to an urban dweller of meagre income.[1] But women with the required qualifications, who can contribute effectively to the economic prosperity of a marriage will not usually tolerate polygamy; they would refuse to marry or remain with a polygamist of inadequate means, and tend to marry men of higher social and economic status than their own. Many Nigerian women today marry for lucre, not love. Their preference for money in the choice of a spouse has been noted by several writers,[2] and is exemplified in Onitsha Market Literature[3] in such salacious titles as "Why Boys Never Trust Money-Monger Girls; "Beware of Harlots and Many Friends", "Beware of Women", Money is Hard but Women Don't Know", in which women are portrayed as immoral Shylocks, bereft of capacity for conjugal love.[4]

Not only is the educated woman unlikely to choose an economically inferior marriage partner, but she can more easily manipulate the marriage relationship, and can more effectively exert pressure to prevent her husband

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1. An informant in Calabar, a junior Civil Servant stated that he had two wives, one married for him by his mother, when he was a small child, and the other his own choice. Because of his small salary he was forced to keep the senior wife in his home village, where she could engage in farming, and help to eke out his meagre salary. He had married the second wife, despite the prohibition against polygamy imposed by his church, "The Jehovah Witness". See also Unokanma Okonjo, The Impact of Urbanization on the Ibo Family Structure, (Germany: 1970), p. 157.
2. See Phoebe Ottenberg, "The Changing Economic Position of Women among the Afikpo Ibo", in Continuity and Change, edit. by Bascom and Herskovits, op.cit. p.213; Mary Kingsley, Travels in West Africa, Abridged edit. (London: MacMillan and Co. Ltd. 1897), p.153.
3. Pamphlets by amateur writers who centre their attentions mainly on the cultural changing habits and attitudes in the society; see E.N. Obiechina, edit., Onitsha Market Literature, (London: Heineman, 1972).
4. Obiechina, Onitsha Market Literature, op.cit., p.132.

marrying further wives than an uneducated wife. This aspect of the behaviour expected or tolerated from a good wage earner was succinctly expressed in the typical unsophisticated manner of a child. When asked to write an essay on "The Status of Nigerian Women", for the present writer, one pupil said:

> "Women who are educated and work very hard and make money for the family do not take bluffs".[1]

By this she meant that women who are educated or economically independent would not tolerate certain behaviour from their husbands.

The cycle is completed by the fact that men who can afford to maintain many wives, show a reluctance to engage in legal simultaneous polygamy,[2] (although, as will be later seen, they are not averse to surreptitious bigamy), since monogamy has to a large extent replaced polygamy as an indication of social prestige.

More detailed research is necessary in order to determine to what extent polygamy remains an emblem of kingship and chieftaincy, but there are some indications that in this respect also, polygamy no longer holds sway as an index of prestige and power. For example, the Obi of Onitsha from 1962-1970[3] was, until his death a monogamist. Similarly, the present Obi,[4] has only one wife. The Clan-Head of Ikpai, the traditional ruler of Qua Town in Calabar,[5] although previously married to

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1. Essay submitted by Freda McEwen, pupil of W.T.C. Primary School, Enugu on 21 October, 1977.
2. See Alison Izzett, "Family Life Among the Yoruba in Lagos, Nigeria", in Social Change in Modern Africa, edit. by Southall, op.cit. p.313; Bascom, The Yoruba of South Western Nigeria, op.cit. p. 65; Okonjo, The Impact of Urbanization...", op.cit. p.160.
3. Obi, Joseph Okwudili Onyejekwe.
4. Obi, Okechwukwu Okagbue of Onitsha.
5. His Excellency, Ntoo Etim.

three women, at the time of the field-work for this thesis, had only one wife, and refused to marry another, in spite of the pressure of work involved in the official entertainment of his subjects. Many of the Clan-Heads as well as other minor chiefs interviewed in Eket were monogamists.

(c) The need to cater for periodical continence

Many traditional societies forbid women to indulge in sexual intercourse during periods of menstruation, pregnancy and lactation, which might last from two to five years in the latter case.[1] A menstruous woman was usually ostracized and various social and other taboos were imposed in most African, as well as other societies.[2] In Nigeria menstruous women were prohibited from cooking for their husbands in many societies.[3]

Similarly, it was the practice in Nigeria to prolong the post-partum period to several years during which time marital sexual intercourse was forbidden. Information collected during field work revealed that the

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1. Various reasons were advanced for this practice, including the health of the children, e.g. Ogilvy says: "African women keep from men as long as the child cannot go, or commonly until it attains the age of one year and a half; unless the child sucks so long it would be infected with some remarkable infirmity". see J.O. Ogilby, Being an Accurate Description of the Regions of Barbary, Libia (Ethiopia),(London: 1670), p.496; see also Newland, West Africa, op.cit. p.159; Paul Bohannan, Africa and Africans, op.cit. p.161; Basden, Niger Ibos, op.cit.p.188; Bosman, Description of the Coast of Guinea, op.cit. p.447, and Landolphe, "It is also criminal to cohabit during a wife's periodical sickness, or when the woman is enceinte,or with milk" as quoted by Ling Roth in Great Benin, op.cit. p.39; Compare J.A. Dubois, Hindu Manners, Customs and Ceremonies, Trans. and edit. by Henry K. Beauchamp, 2nd. edit. (London: Clarendon Press 1889, pp.602-603 of Hindu women in similar circumstances: "The mere wish to cohabit with her husband would be a serious sin".

2. See Richard Burton, Selected Papers on Anthropology, Travel and Exploration, edit. by N.M. Penzer, (London, A.M. Philpot Ltd., 1924), p. 120; see also Ling Roth, Great Benin, op.cit.p.50 quoting Landolphe and Nyendael; footnotes 2 and 3 continued.....

period of abstention observed formerly ranged from two to five years, with an average of three years among older interviewees. In Onitsha, the three years prohibition is emphasized by the fact that age groups are arranged triennially, and two maternal siblings are not permitted to become members of the same age-grade, even if in actual fact, they are qualified to be, since it was usually regarded as an abomination for women to give birth to two children within three years.[1] This prohibition is preserved and is currently observed, even though the post-partum sex taboo is almost non existent in most parts of Nigeria.

A very old Onitsha informant, commenting on the behaviour of modern wives in this respect, said: "women abstain from sexual relations for three weeks after child-birth and in some cases not even for so long".[2] Her opinion was confirmed by several other informants including nurses from the School of Midwifery in Maidugari who volunteered the information that judging from the time when their patients became pregnant after the birth of a child, the period could be,as little as three weeks, but generally tend to be two to five months.

Footnotes 2 and 3 continued..... Equiano, op.cit.p.12; Talbot, Peoples of Southern Nigeria, op.cit. Vol.III, p.712; Christine Oppong, "Notes on Cultural Aspects of Menstruation in Ghana", Institute of African Studies Research Review, 1973, Vol.9, No. 2 pp.33-38.

3. See Talbot, Tribes of the Niger Delta, op.cit. pp.209-210.

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1. See Basden, Niger Ibos, op.cit. p.188.

2. Recorded interview with Mrs. Omenye, held at Onitsha on 25 July, 1977. Her opinion of spacing between births was confirmed by the statistics collected from informants during field work, as to the periods of abstinence observed after child-birth. The average was six months. Compare Olusanya, The Educational Factor in Human Fertility: A Cast Study of the Residents of a Suburban Area in Ibadan, Western Nigeria, (N.I.S.E.R. Reprint Series, No. 49 1967), p.365 Table XXII, who found that the ideal mean intervals between births of one child and another was stated to be roughly, 3, 2 and 2 respectively by women with no education, with primary or modern school education, or with higher school or higher education.

Men were not debarred from sexual intercourse during the post-partum periods of a wife. Various authors have asserted that polygamy thus provides a husband with a socially acceptable way of fulfilling their sexual needs during these periods of prolonged female continence following pregnancy, and during lactation.[1]

This argument is not very persuasive, unless the husband has a relatively large number of wives, or some of the wives are past the child-bearing age. This is obvious from the fact that, since contraception was not usually practised,[2] and women were anxious to get as many children as possible, invariably all the wives would be at various stages of pregnancy and lactation at the same time. The polygamous husband would therefore be nearly in the same position as a monogamous husband. For example, Forde[3] says that among the Yako, a man is induced to take a second wife, normally a previously unmarried girl within two months of his first wife's pregnancy, since sexual intercourse with the latter is forbidden within two years. But this assertion ignores the fact that the second wife could herself become pregnant within a week (or less) of the commencement of sexual relations, and thus be similarly disqualified to have sexual intercourse with the husband.

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1. Paul Bohannan, Africa and Africans, op.cit. pp.161-16; Shorter, op.cit. p.174; Murdock, Social Structure, op. cit. p.37; Hillman, Polygamy Reconsidered, op.cit. p.123; see also, Joseph Mullins, The Catholic Church in Modern Africa, op.cit. who advocates that priests should support efforts being made to have African children weaned after about nine months, and abolition of traditional taboos on intercourse, as measures to encourage monogamy; and Stephen Gwynn, The Life of Mary Kingsley, (London: MacMillan and Co. Ltd., 1933) p.77; a Missionary is reported to have said "A blow must be struck at polygamy and that blow must be struck with a feeding bottle".

2. See Olusanya, The Educational Factor in Human Fertility, op.cit. pp.367, 372; see also Evans-Pritchard, Some Aspects of Marriage and the Family Among the Nuer, op.cit. p.46.

3. Daryll Forde, Marriage and the Family Among the Yako, op.cit. p.77.

It is submitted that periodical continence of women was never a valid reason for polygamy, and examination of polygamous families support this submission. Siblings of different mothers in a polygamous family usually have corresponding ages in many cases, signifying that their mothers were all pregnant at the same time.

(d) The attraction which female youth and beauty exercise upon men

Most men will not readily admit this as a reason for the practise of polygamy.[1] It is a fact, however, that youth is generally attractive, whether male or female, and men who marry further wives, invariably choose younger girls than their existing spouses, often young enough to be their grandchildren, especially in traditional society.

The tendency in older men to practise polygamy has been well documented, and polygamy may be regarded as a bolster for an old man's ebbing ego, and a bulwark against the inevitability of old age. Thus Nadel discovered that among the upper classes of Bida, "old men long past marrying age would still add young girls to the number of their 'wives'. Aphrodisiacs (which one can buy from the barber-doctors in Bida) and stimulants (above all kolanuts) keep alive their sexual appetites".[2] He gives the example of old "S., who died in 1935, 70 years old", and who "had married a new young wife only the previous year, and a son was born to him (to him at least in the legal sense) posthumously". Ward adds his quota: He says:

> "The Yoruba woman ages quickly. After the birth of her first child the bloom of her premarital state is gone. She has lost the youthful shape, the fine carriage, and the appearance that are so characteristic of the girls of her race. The

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1. See Shorter, op.cit. p. 173.

2. Nadel, Black Byzantium, op.cit. p. 152.

> Yoruba man, however, no matter how old he himself may be, nearly always desires a young attractive woman".[1]

Basden describes this tendency of old men to marry young women as a "pernicious state of affairs", and observes that

> "it acts as a bar to the marriage of the young virile men; it creates dissatisfaction amongst the young wives as they are not prepared to endure married life simply as the appendages of one who, too often, is a more or less decrepit old man, and the result is an unprecedented increase in illicit intercourse".[2]

Preference for younger wives is not confined to societies where polygamy is the norm, nor to traditional societies. It is universal,[3] and of all ages,[4] and may therefore be regarded as instinctive in humans. That the expression of the instinct in men is applauded, while in women its existence is denied, or if expressed, is derided, is indefensible. Once a woman's child-bearing period is over, it is assumed that her capacity for sexual experience, even with a husband of similar age, also ends.

The female menopause is "presumed to signify demise of sexual interest ",[5] as the ovaries atrophy, the sexual impulse pass into extinction.[6] Dickenson,[7] in a

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1. Ward, Marriage Among the Yorubas, op.cit. pp.31-32; see also Daryll Forde, "Double Descent Among the Yako" in African Systems of Kinship and Marriage, edit. by Radcliffe-Brown and Forde, op.cit. p.290.
2. Basden, Among the Ibos of Nigeria, op.cit. p.101.
3. See e.g. Godfrey Wilson, "An African Morality", 9 Africa, 1936, p.75 at p.77. Cf. Edwin Ardener, Divorce and Fertility: An African Study (London: Oxford University Press 1962), p. 33, who found that the distribution of the women's age group showed a direct general relationship of polygamy to age, and he concluded that the tendency for men to marry further wives increases with age and they tend to marry younger women than their first wife.
4. See Villars, op.cit.,pp.47-51.

footnotes 5, 6 and 7 continued.....

study of both young and menopausal patients discovered that women's greatest peak of intensity of sexual desires existed during the climateric. Yet this is the period that a Nigerian wife is often divorced, or deprived of sexual contact with her husband, while the latter, invariably much older than she is, is entitled to marry younger wives. The practice of polygyny discriminates against women in this respect.

(e) Men's taste for variety

Westermarck notes that the sexual instinct is dulled by long familiarity and stimulated by novelty, and he states that the need for variety is one of the reasons for the practice of polygamy. He narrates the anecdote of the Sheriff of Morocco who, when asked by some English ladies why the Moors did not content themselves with a single wife like the Europeans, answered "Why, one cannot always eat fish".[1] A more correct answer, perhaps would have been, one cannot always eat fish from the same dish.

Footnotes 5, 6 and 7 continued....

5. William Masters and Virginia Johnson, Human Sexual Response, (Boston: Little Brown and Co., 1970), p.216; see also M.J. Field, Search For Security: An Ethno-psychiatric Study of Rural Ghana (Faber and Faber, 1960), p.150.

6. Ernest R. Groves, Marriage, (London: Henry Holt, 1933), pp.479-482; see also Langstaff, Adams Rib, op.cit. p.55.

7. See R.L. Dickenson, Human Sex Anatomy: A Topographical Hand Atlas, (Bailliere, Tindall and Cox, 1933), Figure 125; see also Havelock Ellis, The Psychology of Sex, op.cit. p.271; Langstaff, op.cit. p.57; Villar, The Polygamous Sex, op.cit. p.41; Mary Jane Sherfy, "The Evolution and Nature of Female Sexuality in Relation to Psychoanlytic Theory", 14, American Psychoanalytic Association Journal, 1966, pp.28-128 at p.116.

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1. Westermarck, History of Human Marriage, op.cit.p.74, Havelock Ellis, Studies in Psychology of Sex, 1906, Vol.III, part 3, p.228.

A necessary corollary of this reason for polygamy is the argument of pro-polygamy enthusiasts that a monogamous society, by ignoring the basic need of men for sexual variety, creates conditions favourable to prostitution, while polygamy, by catering for this need in the form of multiple marriages, makes it unnecessary for them to patronise prostitutes.[1] This argument was advanced by the old Igbo Chief in Egbuna's Wind Versus Polygamy,[2] in his defence of polygamy. There is by this argument an identification of prostitution with monogamy, and sexual morality with polygamy. Some writers have in fact claimed that prostitution was unknown to Africa before the advent of Europeans,[3] and this claim led Ellis to assert that "the sexual impulse of the noble savage is deficient." Both the claim and the latter assertion are untenable.

There is evidence which shows that prostitution existed in various communities in Africa before any contact with Europeans was established. Bosman, a seventeenth century Dutch merchant, in his account of the customs of Ghana, shows that prostitution was a flourishing institution there before the arrival of the Portuguese, who were the first Europeans to establish settlements on the West Coast of Africa.[4] Prostitution was also traditional in Dahomey,[5]

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1. See e.g. Azikiwe, My Odyssey: An Autobiography (London: Hurst and Co., 1970), p.25.
2. Obi B. Egbuna, Wind Versus Polygamy: Where "Wind" is the "Wind of Change" and Polygamy the "Change of Eves" (London: Faber and Faber, 1964), p.71.
3. See William Hadrian Bonger, Criminality and Economic Conditions, trans. by Henry Horton (London: Heineman, 1916), p.70; Basden, Niger Ibos, op.cit.p. 239.
4. Bosman, A New and Accurate Description of the Coast of Guinea, op.cit. p.211-216.
5. See Bosman, ibid. pp.214-215; see also Alfred Skertchly, Dahomey As it is: Being a Narrative of Eight Months Residence in That Country, (London: Chapman and Hall, 1874), pp.283-284; Bowdich, Mission From Cape Coast to Ashanti (London: 1873), p.212.

in Nigeria among the Nupe[1] and Hausa[2] and in many other parts of Africa.[3] It is therefore evident that polygamy does not prevent prostitution. As will be later seen,[4] polygamy is still practised to a considerable extent in the Northern States among all sections of the communities. Nevertheless, prostitution continues to exist, and a man with three or more wives still indulges in prostitution.

(II) The unequal numbers of men and women in a society

Strictly speaking the unequal numbers of men and women in a society do not provide a reason for polygamy, since men do not contract multiple marriages for philanthropic reasons. The hypothesis is that a surplus of females makes polygamy feasible. Thus Basden says that "in order for polygamy to exist at all there must be more women than men". But Westermarck provides numerous examples of societies with a surplus of men, which nevertheless practise polygamy to a considerable extent.[6]

Population statistics indicate that there are probably more females than males in sub-Saharan Africa as a whole,[7] but while this imbalance may be reflected

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1. See Nadel, op.cit. pp.152-156; 333-334.
2. M.F. Smith, Baba of Karo: A Woman of the Muslim Hausa, (London: Faber and Faber, Ltd., 1954), pp.25-26, 63-6, 225, 274.
3. See generally Fernando Henriques, Prostitution and Society: A Survey, (London: Macgibbon and Kee, 1962) Vol.I, pp.370 et al.
4. See further Chapter IX, pp. 33-37.
5. Basden, Among the Ibos of Nigeria, op.cit. p.99.
6. Westermarck, The History of Human Marriage, op.cit. Vol.III, pp.52-55 and 64.
7. Dorjahn, "The Factor of Polygyny in African Demography" op.cit. pp.95-96, 105-109; J.C. Caldwell, "The Demographic Situation", in The Population of Tropical Africa edit. by Caldwell and Okonjo, op.cit. pp.11 and 21; Ettienne Van de Walle, "Characteristics of African Demographic Data" in The Demography of Tropical Africa, edit. by William Brass (Princeton, New Jersey: Princeton University Press, 1968), pp.38-43.

in some countries, for example, Guinea,[1] Tanzania[2] and Sierre Leone,[3] other countries which practise polygamy show a preponderance of males, for example, Ghana (then Gold Coast) in 1911, 1921, 1931, and again in 1948.[4]

Moreover, although a country as a whole may have a female surplus, particular areas or communities may have a surplus of males, and without contracting marriages outside the community, the level of polygamy may still be very high. For example, the Nigerian Population Census, 1953, shows a female surplus for the country as a whole,[5] and this female surplus is reflected in the Regional figures, but Ibadan and Rivers Provinces show a male predominance of 1,023 and 1,018 respectively in every thousand females, while the figures for Lagos Township in December 1952, registered 1,041 males to every thousand females.[6] Yet polygamy flourishes in these areas. That there is still a significant incidence of polygamy in these areas, for example, in Ibadan and Lagos, as compared with areas with a female surplus, negates the supposition that there must be a female surplus in order for polygamy to exist.

The persistence of polygamy in the presence of a male surplus lends support to the findings of Dorjahn,[7]

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1. See Van de Walle, "Marriage in African Censuses, and Enquiries" in Demography of Tropical Africa edit. by William Brass op.cit. p.218.
2. See Hastings, Christian Marriage in Africa, op.cit. pp.130, 132.
3. See Dorjahn, op.cit. p.107.
4. See Dorjahn, op.cit. p.107; see also Kenya and South Africa, Hastings, Christian Marriage in Africa, op. cit. p. 131.
5. Population Census of Nigeria, 1952-53, op.cit. Table 1, p.2.
6. Ibid.; Table 2, p.3; par. 54, Population Census, Western Nigeria, (Government Printer, Western Nigeria, 1952).
7. Dorjahn, op.cit. p.108.

who, from comparison of statistical data from Africa, rejected the hypothesis that polygyny is possible because there are more women than men, and even where there was a surplus of females, he noted that it was by no means sufficient to account for the incidence of polygyny in the various parts of Africa.

It should be noted that the existence of polygamy in the presence of a male surplus mentioned above would not be affected to any great extent by the fact that men marry at a later age than women since the mean age of first marriage of men and women shows an increasingly closer approximation in modern Nigeria.[1]

Begho states that "unlike Rome in the days of Romulus there were sufficient women in Nigeria that marrying more than one could not be regarded as anti-social".[2] The writer gave no indication of the relative number of men and women he had in mind, but most of the published estimates of the ratio of imbalance between the sexes in the Nigeria population do not seem to justify his conclusions. A census taken in Lagos in 1872 showed that there were 27,774 men and 32,353 women among the population of African origin.[3] There were therefore 886 male to every thousand female, or 1:1.1. This seems to be the greatest surplus of women over men ever recorded in any part of Nigeria within the last 100 years,[4] and it can hardly justify polygamy.

Dorjahn[5] rejects the assumption that many men go through life unmarried so that a few can be polygamous, but gives no reason for doing so. Felkin states that among the Baganda, the proportion of females to males was 3½:1. Yet, owing to the frequency of polygamy, a large number of the poorer men were unable to marry.[6] This

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1. See below, Chapter V.
2. Begho, op.cit. p. 27.
3. Vogt, "Die Bewotwer Von Lagos", in Globus XLI, p.253, cited by Westermarck, History of Human Marriage, Vol.III, op.cit. p.60.
4. See the 1911, 1921, 1933, 1952/53 and 1963 censuses.
5. Dorjahn, op.cit., p.108.
6. R.W. Felkin, Notes on the Waganda Tribe of Central Africa, in Proceedings, Royal Soc. Edinburgh, 1886, Vol.XIII, p.744 as cited by Westermarck, op.cit. p.35.

assertion is disputed by Westermarck, who contends that it is not "likely that men had to remain unmarried on account of poverty in those primitive conditions where there was no accumulated property worth speaking of".[1] Felkin's findings were substantiated, however, by information collected during field-work for this thesis. Older informants generally agreed that, in spite of the relatively lower cost of marrying a wife in traditional society, there were many men who were unable to marry because of poverty.[2]

It is suggested that both Westermarck and Dorjahn arrived at their conclusions because they neglected the important economic factor which contributes to the acquisition of many wives, and which also determines the choice of a husband. In a society where men have identical financial status, and where a fairly balanced sex ratio prevails, polygamy would not thrive. Morgan's observation that "in its highest and regulated form it presupposes a considerable advance of society, together with the development of inferior and superior classes, and of some kinds of wealth",[3] remains true today, not only of the practice of polygamy, but some mothers even prefer their daughters to have affairs with prosperous and influential men, rather than to marry a man of low social status.[4]

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1. Westermarck, A Short History of Marriage, op.cit. p.35.
2. For example, among the Ibibios, dowry ranged from as little as 100 manilas (less than £2), yet it was asserted by many informants in Eket that there were bachelors who could not afford to marry because of poverty; recorded interviews with Mrs. Neato Edem, and Madam Judith Coffe Mbang, held on 19 August, 1977 at Eket.
3. Morgan, Systems of Consanguinity and Affinity, op.cit. p.477; see also Villar, The Polygamous Sex, op.cit.p.70.
4. See Mara K. Larson, "Changing Marriage Patterns in West Africa with Special Reference to Nigeria", M. Phil. Thesis, London University, 1968, p.237; A. Izzett, "Family Life Among the Yoruba in Lagos, Nigeria", in Social Change in Modern Africa, edit, by Aidan Southall, op.cit. p.307.

Illiterate girls usually prefer to be one of the multiple wives of a wealthy husband rather than the sole wife of an indigent man, and a few educated women may make a similar choice. Unequal distribution of wealth and social prestige, makes polygamy feasible more than a surplus of females does. Women generally move up the ladder, even in economically advanced countries,[1] and in Nigeria where the economic and social status of women are considerably below those of men, and wives generally identify with the status of their husbands, the tendency to marry for economic reasons remains a significant contributor to polygamy. This tendency decreases with the education of women.[2]

(III) The need to provide for widows under the levirate and analogious systems

In many African systems of law, a man inherited the wives of certain deceased relatives.[3] Similarly, among some communities, a traditional ruler, for example, the Oba (king) of Lagos, inherited the surviving wives of his predecessor in office, regardless of his previous marital status.[4] Refusal was considered a serious breach of familial obligations or tribal political tradition, and considerable pressures would be exerted on an individual

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1. See Villar, The Polygamous Sex, op.cit. p.41.
2. See Remy Clignet, Many Wives, Many Powers: Authority and Power in Polygynous Families, op.cit. p.33.
3. See further, below, Chapter XIII, pp.438-442.
4. See Itse Sagay, "Multiple Marriages in Nigeria: A Conflict of Law with Culture", Nigerian Bar Journal, Vol. XII 1974, pp.82-87, at p.82; see also Nigerian Sunday Times, 31 December, 1972 which reported the statutory marriage of Oba Oyekan of Lagos, although he had allegedly inherited several of his predecessor's wives; D.A. Ijalaye, "Marriage Laws in Nigeria: Harmonisation or Unification", Nigerian Bar Journal, Vol.XII, 1974, p.21-31 at p.24.

to secure compliance. Such laws obviously encourage polygamy, and in traditional society, the so-called "widow inheritance" was a popular method of acquiring multiple wives.

In modern Nigerian society, however, such marriages are becoming increasingly rare, and a breach of the law in this respect earns no censure. Frequently, a young widow remarries to a non-member of her deceased husband's family, while older widows are maintained by their adult children. This law, therefore, can no longer be regarded as a valid reason for polygamy, although the system may facilitate the taking of multiple wives, and may be used as a convenient justification for polygamy, especially where the man involved had previously contracted a statutory marriage, and is thereby legally incapable of contracting a second marriage during the subsistence of the first.

The expedient use of the system is illustrated in a case which occurred recently in Onitsha. The parties were married under the Nigerian Marriage Act, before proceeding for England to undertake further studies. After nearly fifteen years of marriage, they had no children. While they were still resident in England the husband returned to Nigeria, and, unknown to the wife, "married" his deceased younger brother's wife. The brother had died during the Nigerian Civil War, leaving a young widow but no children. The wife only learnt of the "marriage" when she returned to Nigeria later, and this lack of communication eventually led to the first wife obtaining a divorce. The first wife maintained that it was not the fact of the "marriage" but rather the clandestine manner in which it was contracted that excited her hostility, but there is evidence that educated Nigerian women do not usually tolerate polygamy under whatever guise it is practised.

This case raises the interesting question as to the legality of the husband's alleged "marriage" with his deceased brother's wife. The husband was married under the Nigerian Marriage Act, and therefore incapable of contracting a further marriage during the subsistence

of his first marriage.[1] Is inheritance of a wife under such circumstances considered to be a valid customary marriage? If it is, the husband's purported second marriage is void.[2] If it is considered a right of inheritance and not a marriage, the union between the husband and his deceased brother's wife would be a valid customary union, which falls short of the status of marriage, (a sort of concubinage).

It is respectfully submitted for reasons given later, that "wife-inheritance" is a marriage, and what the inheritor inherits in such a case is not a wife, but rather the dowry the deceased husband paid for the widow, which entitles him to be considered as a prospective husband of the widow if they both consent. If this viewpoint is accepted, the purported marriage of the husband to his deceased brother's wife before the dissolution of his statutory marriage is void and attracts criminal liability under the Nigerian Marriage Act.[3]

5. Incidence of polygamy in Nigeria

The high incidence of polygamy among kings and chiefs has already been noted.[4] Among the generality of the Nigerian population, however, there is evidence which indicates that even in traditional society, the number of wives each man had very seldom exceeded two or three, while many men had only one wife. Ward, writing about the Yoruba states that among the rank and file

> "monogamy is the common form. This however is not from choice but is mainly due to the relatively high bride price...Except where

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1. See further below, Chapter X.
2. Marriage Act, cap 115, Laws of the Federation of Nigeria, 1958 Revision, S.35.
3. Ibid., s.47.
4. See above, pp.311-312.

> chance or inheritance throws another wife in his way, the commoner remains a monogamist all his life".[1]

Johnson asserts that in ancient times "the Yorubas were mostly monogamic; not from any enlightened views on the subject, however, but rather from necessity; for although polygamy was not actually forbidden, yet only rich folks could avail themselves of indulgence in that condition of life".[2] As long ago as the seventeenth century Bosman recorded of the Benins: "The Men here Marry as many Women as their Circumstances will allow them to keep".[3] Similar statements are made about other Nigerian tribes.[4]

Murdock rejects the criterion of numerical preponderance to classify a society as monogamous or polygamous, since monogamous unions nearly always outnumber polygynous ones at any given period of observation, even in societies where the preference for plural wives is extreme. He classifies a society as polygynous "whenever the culture permits and public opinion encourages, a man to have more than one wife at a time, whether such unions are common or comparatively rare, confined to men

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1. Ward, Marriage Among the Yoruba, 1937, p.41.

2. Johnson, History of the Yorubas, op.cit. p.113. Cf. Akiga, Akiga's Story, op.cit. pp.313, 349; the Tiv traditionally were also mostly monogamous; polygamy was forced on them by epidemics which depleted the population.

3. Bosman, A New and Accurate Description, op.cit. p.441

4. See generally, Bohannan, "The Tiv of Nigeria" in Peoples of Africa, edit. by James Gibbs, op.cit. p.527; Roth, op.cit. p.40; Basden, Niger Ibos, op.cit. p.228; M.J. Mortimore, and J. Wilson, Land and People in the Kano Close-Settled Zone: A Survey of Some Aspects of Rural Economy in the Ungogo District, Kano Province (Ahmadu Bello University, Department of Geography, Occasional Paper, No. 1, March, 1965), p.31; Nadel, A Black Byzantium, op.cit. p.358; Meek, Northern Tribes of Nigeria, op.cit. p.195; Jordon, Bishop Shanahan of Southern Nigeria, 1949, op.cit. p.222.

of outstanding prestige or allowed to anyone who can afford them".[1] In all cases where polygamy enjoys superior prestige, and is not the exclusive prerogative of a very small status group, he assumed that polygamy is the cultural norm.

It has been previously shown that polygamy in traditional Nigeria was extremely prestigious, a "laudable ambition" of most men. Despite the preponderance of monogamous unions, traditional Nigerian societies could be characterised as culturally polygamous according to Murdock's definition.

The extent to which this characterization can be validly applied to modern Nigerian societies is difficult to determine for Nigeria as a whole. In the Moslem areas,[2] and possibly among the rural Yoruba Moslems elsewhere,[3] polygamy continues to be accorded high prestige, but among educated Yorubas, and the other communities in the Southern States of Nigeria, polygamy can no longer be said to be the cultural norm.[4]

For example, field-work for this thesis was done in two villages in Onitsha. In one of these villages, Umudei Village, it was not possible to find a man who was currently living with more than one wife, although a few of the older men, at one time or the other, had been polygamously married. In the other village, Ogboli Eke, informants could recall only about six cases where older men were currently married to, and living with, two or more wives. Two of these men were interviewed. One had two, and the other three, wives. In neither village was

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1. Murdock, Social Structure, op.cit. p.28
2. See below, Chapter IX, pp. 23-37.
3. See Galletti, Baldwin and Dina, Nigerian Cocoa Farmers, op.cit. p.73. See Marris, Family and Social Change in an African City: A Study of Rehousing in Lagos, op. cit. pp.47-48; but see Elias, The Nigerian Legal System, op.cit. pp.296-297.
4. See Table 4:2 below.

there a case of polygamy among the under-thirty age group. In the thirty-to-fifty age group, there was only one man who had two wives. When his first wife was interviewed she described him as a "foolish man who says he has married a second wife when he cannot even support his children". Although admittedly she was his wife, she alleged that she was not living with him, nor was she being maintained by him. It was evident that they were husband and wife in name only.

Ohadike notes that, of all aspects of traditional family life, the decline of polygamy particularly in the urban areas would seem to be one of the most likely casualties of social changes.[1] This statement seems generally true, as several recent surveys of various Nigerian urban and rural areas, especially of the Yorubas, have established. For example, a survey of 776 domestic units of Yoruba cocoa farmers, in 1956,[2] revealed that the greater majority of the farmers appear to have either one wife or two; 34.9% had one wife, and 32.4% had two wives. Of all the units 62.6 were polygamous, 35% monogamous and 2.4 wifeless.

Yoloye, who conducted a survey in 1967 in three types of schools in seven rural areas in Western Region of Nigeria, recorded a similar finding. The large majority of children in all three types of schools came from polygamous homes; 76.4%, 79.6% and 77.6% for primary, secondary modern, and secondary grammar schools respectively.[3]

These findings could be compared with that of

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1. P.O. Ohadike, "A Demographic Note on Marriage, Family and Family Growth in Lagos, Nigeria" in The Population of Tropical Africa, edit. by John C. Caldwell and Chukuku Okonjo, op.cit. pp.380-382.

2. See Galletti, Baldwin and Dina, Nigerian Cocoa Farmers op.cit. p.73; Cf. I.H. Vanden Driesen; Some "Observations on the Family Unit, Religion and the Practice of Polygyny", 42, Africa, 1972, pp.44-56.

3. E.A. Yoloye, "Socio-Economic Background and School Population: A Survey of the Background of Children in Three Types of Schools in Western Region of Nigeria", (Unpublished Ms. 1967), p.6.

Marris, who conducted a social survey in three areas in and around Lagos in 1958/59 and found that 38% of all male householders interviewed were polygamous.[1] The majority were therefore monogamous. Similarly, a small random sample survey of the municipal area of Lagos in 1964, established that 68.6% of the wives interviewed were monogamous and 31.4 polygamous.[2]

Okonjo also recorded a differential intensity of polygamy between urban and rural areas among the Igbos. In two districts of Enugu Urban, 8% and 14% of householders interviewed were married polygamously, while 18% and 23% were recorded for the nearby rural areas of Okpatu and Udi.[3] The degree of polygamy recorded among the Igbos by Okonjo spotlights a differential of intensity of practice by Yorubas and Ibos, which will be further highlighted shortly by research findings during fieldwork in Ibadan and Ejigbo, and Onitsha and Nsukka communities.

From the above figures given for rural and urban polygamy it may be concluded that the incidence of polygamy is higher in the urban areas than it is in the rural areas of any ethnic group, but this is not universally true as the interesting survey carried out in 1966 in one urban and one rural area among the Igbo and Yoruba respectively, and one rural area among the Ibibio clearly shows.[4] The project was launched by the Institute of Education, University of Ibadan, to research into the characteristics of physical and behavioural development of children in the main linguistic and ethnic groups of Nigeria. On the whole, there was a trend towards monogamous marriages. Of the 925 families studied, 552 were monogamous while 373 were polygamous. The statistics

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1. Marris, op.cit. p.48.
2. See Ohadike, op.cit. p.381, Table 1.
3. Okonjo, The Impact of Urbanization, 1970, p.160.
4. Ngwobia Uka, Growing Up in Nigerian Culture, op.cit. p.14.

were as follows:

TABLE 4:1

Household Arrangements[a]

Centre	Monogamous households	Polygamous households	Total	Percentage of polygamous households
ABA Urban	115	50	165	30.3
Ibadan Urban	109	79	188	42
Ifeodan Rural	102	136	238	57.1
Ihioma Rural	112	46	158	29.1
Ikot Ada Idem	114	62	176	35.2

a. SOURCE: Ngwobia Uka, Growing up in Nigeria, op.cit. p.14; percentages (final column) added.

It can be seen that there were more monogamous than polygamous households in all areas except the rural Yoruba area of Ifeodan.[1] There was a greater number of polygamous households in Aba (Igbo) urban, than at Ihioma (Igbo) rural, which contradicts the hypothesis that polygamy is more common in rural than in urban areas. The Yoruba/Igbo differential is confirmed. A higher percentage of polygamous families is recorded for the Ibibios than for the Igbos, while among the three ethnic groups, the Yorubas register the highest percentage of polygamous households.

Table 4:2 records the findings of the present writer's field research. It was found necessary to classify interviewees according to age-groups, as the incidence of polygamy tends to rise with age.[2] The degree

1. Table 4:1 and see Uka, op.cit. p.14.

2. Ardener found that the distribution of Bakweri women's age-groups showed a direct general relationship of polygamy to age, the percentage being 20% in the youngest age group, and 38.5 % in the oldest; see Edwin Ardener, Divorce and Fertility: An African Study, (London: Oxford University Press, 1962), p.33.

of polygamy found in four of the communities in the Southern States, during field-work is set out in Table 4:2 under three age groups as follows:

TABLE 4:2

INCIDENCE OF POLYGAMY AMONG MARRIED MALE INTERVIEWEES[1]

Area	Age of Male Interviewees						Total Interviewed	Percentages Married Polygamously
	Below 30 yrs.		30-50 yrs.		Above 50 yrs.			
	Mon.	Poly.	Mon.	Poly.	Mon.	Poly.		
Onitsha (urban)	11	Nil	18	1	26	2	58	5.1
Nsukka (urban)	8	Nil	18	9	1	4	40	32.5
Ibadan (urban)	2	Nil	6	2	12	5	27	25.9
Ejigbo (rural)	1	Nil	2	Nil	1	3	7	42.8
	22	Nil	44	12	40	14	132	

From Table 4:2 it can be concluded that in all four communities studied, monogamous marriages greatly exceeded polygamous marriages, and polygamy reached its lowest ebb in the urban area of Onitsha, even among the oldest age group. Only 5.1 percent of the 58 men interviewed there were married polygamously at the time of interview. This accords with the figure for Enugu Urban found by Shields in 1965, when 5.8 percent of 853 households interviewed were found to be polygamous, and also with Okonjo's finding that 8 percent, and 14 percent of

1. Ejigbo is taken here as rural, but the population as recorded in the 1963 Census was 46,410; Compare the population of Ibadan, 627,379 and Onitsha Town, 163,032. The statistics for Nsukka were obtained from interviews in two villages, Akpa-Edem and Orba.

households were polygamous in two different districts of Enugu Urban. However, it is interesting to note the great variation between the two urban areas of Onitsha and Enugu, and the urban area of Aba, in which 30.3 percent of 165 households interviewed were polygamous. In all three areas the population is predominantly Igbo.

The discrepancy may be accounted for by the fact that Enugu is a city of civil servants who cannot afford to be polygamous. Aba and Onitsha are both large trading centres, with uneducated, but prosperous businessmen, but the men interviewed at Onitsha for the present study, belonged to the indigenous community, and their life-style is in contrast with that of the business community found at the Water-side Area. The date may also be important: the Aba survey was conducted in 1960, the Enugu study in 1965-1966, and the Onitsha figures were obtained in 1978.

These figures, although they represent very small samples of the communities, are primitive guides as to the extent to which polygamy is still being practised in the various Nigerian communities. They do not, however, attest the decline of polygamy asserted by many writers. A rough index of the decline of polygamy is provided by the marital genealogy of the households in which the interviewees grew up. The total number of households interviewed in the Southern States, for the purposes of this thesis was 349. Only one person was interviewed in each household, and they were asked to give the marital history of the male head of the household in which they grew up (in most cases their father's household). The number of wives married by the 349 male heads of households in which the interviewees grew up was 1,318 wives, giving a mean average of 3.7 wives for each household head. But the 132 men interviewed, together married only 173 wives, a mean average of 1.3 wives per man.

A clearer picture emerges if the 28 men above fifty years old, interviewed in Onitsha are taken. Although at the time of the interview, only two of them

were polygamously married, as previously noted, all but five of them had previously been polygamously married. The aggregate number of wives married by the 28 men was 50, an average of 1.7 wives per man, but the fathers of these men had between them 106 wives, an average of 3.8 wives per man. This differential provides some evidence of the decline of polygamy.

6. Concubinage

In some systems of law, apart from the wife or wives a man is allowed to marry, he is also permitted to have one or more concubines, with a legal status inferior in most cases to that of a wife.[1] For example, according to Islamic law, a man may marry four wives, but there is no legal limit to the number of concubines he may have.[2] Similarly, according to the marriage customs of old China, it was customary for a man to take a principal wife, the tpais first (though not invariably), in a formal ceremony; the husband was free to take as many tsips, or "secondary wives" as he liked, and a formal ceremony was not required.[3]

Concubinage in such cases is a legally recognized institution, and the concubine and her children have certain defined legal rights and obligations. To what extent does Nigerian customary law recognize the status of concubinage?

The question is a difficult one, due to the fact that various writers use different terms to designate the same institution. For example, with reference to the system whereby two levels of dowry payments operate in the same community, Esenwa refers to the union which is

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1. See Diamond, Primitive Law, op.cit. p.253; concubinage is a type of marriage in which the woman occupies an inferior social position to that of the true wife in the same community.

2. See further, below, Chapter IX.

3. See Cheang Thye Phin v. Tan Ah Loy [1920] A.C.369; This was also the law in Singapore until 1961, when the Women's Charter of Singapore was passed, and marriages since then are strictly monogamous; see Poon v. Tan [1973] 4 Family Law Report, 1974, p.161.

contracted by the payment of a small dowry, usually in the form of presents, as "concubinage", and the union contracted by a high dowry payment as "marriage".[1] Obi takes a similar view, and "marriage by consent only", which,as previously stated,is popular among some Yoruba communities, he dismisses as "concubinage" and not marriage.[2]

Meek, writing of Owerri Igbos in 1937 states:

> "There is in the Owerri Division a legitimate form of paramour relationship known as Iko-mbara. By this a husband allows a friend or acquaintance to sleep with his wife regularly on one night of the eight day week. The paramour is required to give the husband a gift of two jars of wine, one leg of meat, a chicken, and some cash. He is also expected to assist the husband in farm work, when called upon. The practice is particularly common in cases of elderly men married to young women".[3]

Uchendu, who wrote of concubinage among the Ngwa Igbos, characterizes the institution of wife lending (or renting?) described by Meek, and all other forms of recognized and approved sexual intercourse between a man and a woman as "concubinage". Thus he stigmatizes "woman-to-woman marriage", whereby the "wife" of a female "husband" consorts with a chosen paramour, and the system of idegbe under which a father retains one of his unmarried daughters to beget children (by a paramour) who would be affiliated to the father's lineage, as "concubinage".[4]

There is little evidence, however, of a system of concubinage comparable to that of Islamic or Chinese customary law, under which a man cohabits with a wife or wives, as well as with other women occupying the legal position of "secondary wives", with defined rights and

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1. Esenwa, op.cit. p.75.
2. Obi, Modern Family Law, op.cit. p.158.
3. Meek, Law and Authority in a Nigerian Tribe, op.cit. p. 276.
4. See Victor C. Uchendu, "Concubinage Among Ngwa Igbo of Southern Nigeria", 35 Africa, 1965, pp.187-196 at pp. 189, 192.

obligations, existing among any of the main ethnic groups in Nigeria. In Agongo v. Asekile and Anor,[1] it was stated that Yoruba customary law "recognizes concubinage in favour of the man and disallows it for the woman". It is respectfully submitted that there is no evidence of concubinage as a recognized legal status in Yoruba customary law or indeed in any other customary law in Nigeria. The various Nigerian institutions which writers refer to as concubinage are essentially different in form to concubinage in which a man cohabits with two or more women simultaneously, the women being assigned different legal status.

7. The status of wives in polygamous households

What is the legal status of the wives in a polygamous household? Do all the wives of a polygamous husband have equal rights and duties, regardless of age or the sequence of marriage? Has the husband a duty not to discriminate among his several wives in all matters? Is it discrimination to treat a wife from a low social or economic background in the same manner as a wife who, previous to her marriage, was higher up the social scale?

Of the legal status of the wives in a polygamous household among the Igbos, Basden states:

> "Whilst polygamy is recognised as an integral part of the social economy of the Ibos, yet in actual fact one wife only is specifically acknowledged. In native law the first wife alone is granted the position and rights of a legal wife. She alone bears the title of "anasi" and,...in every way the distinction between the first wife and the others is clearly defined, showing that, in principle, the Ibo recognises but one legal wife".[2]

It is respectfully submitted that this statement, insofar as it relates to the legal status of the wives,

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1. [1967] N.M.L.R.21.

2. Basden, Among the Ibos of Nigeria, op.cit. pp.97-98; Basden, Niger Ibos, op.cit. pp.228-229.

cannot be supported with reference to Igbo, or most other Nigerian customary laws.[1] There is evidence that the senior wife of a polygynist is treated with a greater measure of respect than his other wives, among most communities. For example, among the Yorubas, a junior wife is expected to prostrate before a senior wife, and to perform certain services for her.[2] There is also some evidence that in domestic matters, the senior wife usually has some measure of control over the other wives, and she also has the duty of performing certain religious rites for her husband.[3] None of these rights or obligations are, strictly speaking, legal obligations, nor do they give her a superior legal status.[4]

Seniority in most societies is reckoned from the time of a woman's marriage into the family, and not according to the relative ages of the wives. It is therefore possible for a much younger woman to be senior to an older woman, in terms of age.[5]

The husband has no legal duty not to discriminate among his several wives, although it may be politic for him to be impartial, in order to secure a greater degree of domestic harmony.

Each wife has a right to be provided with living accommodation in her husband's compound, (or by mutual agreement, elsewhere), and in a trading community, for example among the Yorubas, to be given an initial capital

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1. See Daryl Forde, "Double Descent Among the Yako", in African Systems of Kingship and Marriage, edit.by Radcliffe-Brown and Forde, op.cit. pp.326-327.
2. See Fadipe, op.cit. pp.114-115; Meek, Northern Tribes of Nigeria, op.cit. p.196; Cf. Izzett, Family Life Among the Yoruba, op.cit. p.306.
3. See Basden, Among the Ibos of Nigeria, op.cit. p.97; Meek, Northern Tribes of Nigeria, op.cit. p.196; Thomas, Ibo Speaking Peoples, op.cit. Part IV, p.63; Westermarck, op.cit. Vol.III, p.29; A.J.N. Tremearne, The Tailed Head-Hunters of Nigeria (London: Seeley Service and Co. Ltd., 1912), p.235.
4. See Forde et al, The Peoples of the Niger Benue Confluence, op.cit. p.68; Stenning, "Household Viability Among the Pastoral Fulani", op.cit. pp.109-110.
5. See Obi, Modern Family Law, op.cit. p.92; Fadipe, op.cit. p.114; Uchendu, The Igbo of Southeast Nigeria, op.cit. p.86; Ellis, The Yoruba-Speaking Peoples, op.cit. p.182.

for the start of her trading activities. In a farming community each wife is entitled to a share of her husband's yams, etc., and land for farming purposes.[1]

In many communities, each wife has a duty to provide the food, and to cook for her husband for a specific period, usually a week. During the week she cooks for him, she usually also spends the nights with him. But the husband is free to decide his own household arrangements, and provided a wife is not totally neglected materially, or sexually, she cannot complain of unequal treatment, even if she is the first wife.

Among many Igbo societies, for example, Onitsha, when a husband becomes a member of a titled society, such as the Ozo titled society", as a climax to the ceremonies of initiation, he publicly embraces his first son, first daughter, and first wife, three times respectively, and presents them with gifts of money. If, for any reason, the first wife is unable, or refuses to take part in this ceremony, no one, including the other wives, can deputise for her. The initiate has to pay a fine instead, if the first wife is absent.[2] The ceremony of embracing of the first wife has given rise to certain complications and there are many cases in Onitsha recently where a husband has preferred to pay a fine rather than to greet the woman who is legally considered to be his first wife.[3]

Although Basden uses the embracing of the first wife to support his contention that "the first

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1. See below, Chapter VII.

2. See Nnabuenyi Stephen Aniweta Chukwudebe, Onitsha Quo Vadis, compiled and edited by Ben Chukwudebe, (Onitsha, Nigeria, n.d.), pp.23-30; see also S.I. Bosah, Ground of the History and Culture of Onitsha, (Onitsha, Nigeria, n.d.), pp.153-159.

3. For example in a ceremony witnessed by the present writer during field-work in Onitsha, the initiate refused to greet as his first wife a woman married for him by his parents when he was a small child, and with whom he had never lived, or associated, as man and wife. Legally, she was considered to be his first wife, although he had married a wife for himself, whom he had lived with, and by whom he had many children. He opted for the payment of a fine when it was ruled by the community, that he could not greet the second wife.

Woman dancing in preparation to embrace her husband who is in the process of being initiated into the Agbalanze Society. The embracing ceremony is the climax of the initiation procedure

The typical dress worn when a woman's husband is being initiated into the Agbalanze society

woman the man marries alone enjoys the privilege which belong to a legal wife", it should be noted that the Ozo title is a socio-religious institution, which, because of the expenses involved, few men can become members of. It is not part and parcel of Igbo customary law.

8. Attitudes to polygamy in Nigeria

A. The attitude of the Government

The Colonial Administration in Nigeria adopted a tolerant attitude towards the practice of polygamy. Unlike the position in some other colonial territories where polygamy is prohibited by statute,[1] the Marriage Ordinance which introduced statutory marriage and monogamy into Nigeria expressly recognized the validity of customary marriage, and specifically provided that nothing contained therein "shall affect the validity of any marriage contracted under or in accordance with any native law or custom...."[2] As will be seen later,[3] the colonial government entertained the hope that with the introduction of statutory monogamous marriage, the indigenous population would eventually adopt monogamy as the preferred form of marriage.

The attitude of subsequent Nigerian governments on this issue is one of indifference. The legality of polygamy in the customary laws of the various ethnic communities, as well as in Islamic law, is legally recognized, but the practice of polygamy is not actively encouraged. In many cases, the polygamously married spouse is not treated differently from a monogamously married one. For example, under the Income Tax

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1. See e.g. the recent Belgian Decree, (Décret du 4 Avril 1950 relatif à l'interdiction de la polygamie)which withholds recognition from any polygamous marriage contracted after 1950, see Phillips and Morris, Marriage Laws in Africa, op.cit. p.88.
2. See Marriage Ordinance, 1884, S.37; see also S.35, Marriage Act, Cap.115, Laws of the Federation of Nigeria, 1958 Revision.
3. See below, Chapter XI.

Management Act, 1961,[1] a husband who has two or more wives is given an income tax allowance for only one wife. Under the same Decree, each taxpayer is entitled to income tax allowance for four children and one dependent relative. In the case of married couples, however, the spouses together are entitled to allowances for four children and one dependent relative. Where a man is polygamously married, he and his several wives are counted as one unit, and can together claim for four children and one dependent relative only.[2] In other words, no account is taken of his polygamous status.

It is submitted that the system of taxation under the Income Tax Decree discriminates against the polygamously married man, and indirectly, discourages polygamy.[3]

B. Popular attitudes

The attitudes of Nigerians to the practice of polygamy in the modern society reveal some slight differences between men and women, and between the old and the young. While 89.2 percent of the women interviewed during field-work for this thesis advocated monogamy as the better form of marriage for Nigeria in future, only 83.8 percent of the men interviewed were of that opinion. (Table 4:3). Of the interviewees below thirty years of age, 95 percent preferred monogamy, compared with 84.3 percent, and 23 percent among the 30-35 years-old, and above 50 years old, age groups respectively.

(1) Women's attitudes. There is abundant evidence that traditionally, most women were in favour of polygamy,

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1. No. 21 of 1961, Laws of the Federation of Nigeria, S.20A, as amended by the Income Tax Management (Uniform Taxation Provisions Etc.) Decree, 1975.

2. Ibid.,S.20A.

3. See I. Olu Agbede, Recognition of Double Marriage in Nigeria, Int. and Comp. Law Quarterly, 1968, Vol.17, pp.735-743 at p.743, who opines that there is a policy - both legislative and judicial to discourage polygamy and encourage monogamy, in Nigeria.

especially those who were senior wives, and who invariably shared the prestige of the husband. Talbot notes that among the communities in the Southern States, not only do wives like to have others in the house to help with the work, and to provide society, but the more numerous they are, the higher is their social standing, particularly that of the senior wife.[1] Meek[2] makes a similar statement with reference to the communities in the Northern States. He adds that "it is commonly the wife who incites her husband to add to the number of his wives, no doubt with a view to lightening her domestic burdens", while Basden notes that "it is not uncommon to find that women are stout protagonists of polygamy".[3]

Women's attitude to polygamy has changed, considerably, and there are very few women who, in normal circumstances, would incite their husbands to take another wife, in the modern society. Among the reasons given by persons who were interviewed during field-work, for the abolition of polygamy, jealousy among the wives of a polygamous family appeared most often. Although some writers assert the absence of jealousy among the wives in traditional society, there is considerable evidence to the contrary, and in fact, jealousy among wives was, and continues to be, one of the chief deterrents to the practice of polygamy.[4]

The jealousy of the wives is often transmitted, with disastrous consequences in some cases, to their offspring,[5] and most children who grew up in polygamous households reject polygamy, because of the strife and

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1. Talbot, Peoples of Southern Nigeria, op.cit.Vol.III, p. 429; see also Basden, Niger Ibos, op.cit.,pp.228-229.

2. Meek, Northern Tribes of Nigeria, op.cit. p.196.

3. Basden, Niger Ibos, op.cit. p.228; See Stenning, "Household Viability Among the Pastoral Fulani," op. cit., p. 110.

4. Stenning, "Household Viability Among the Pastoral Fulani", op.cit. p. 109; Galletti, Baldwin, and Dina, Nigerian Cocoa Farmers, op.cit. p.78.

5. See Theo Ola Fayiga, "Polygamy in African Society. A Drag on Progress", The University Herald, Ibadan, Vol.I, No.3, 1948, pp.2-3.

turmoils they had experienced as children. An example of this tendency appears in the autobiography of Nigeria's veteran politician, Nnamdi Azikiwe. When his father took a second wife, Zik, as he is popularly known, had the opportunity of experiencing the canker which can consume the harmony of a family. He voiced his resentment of polygamy thus:

> "My young mind revolted against polygamy. I saw my mother exchange blows with my father for no other reason than jealousy. And I saw my mother and the new wife exchange harsh words for the same reason. If father ate all the food cooked by one wife, then the other would regard it as evidence of father's affection for that particular wife. If father chatted with one oftener than the other, then this was regarded as evidence of his affection. So our home became a madhouse. These conditions became unbearable and so my father and my mother agreed to disagree after seventeen years of married life".[1]

By a remarkable coincidence, this was also the experience of another Nigerian veteran politician, Obafemi Awolowo who, in an account of his early life described the shock he received from the "verbal virulence" and "disgraceful scenes" which followed the introduction of a second wife into his father's hitherto peaceful household.[2]

The jealousy of women in polygamous households is universal and is well-documented in the literature on polygamy. Thus Kimball Young, also a product of a polygamous household, writing of Mormon polygamy, remarked:

> "The greatest check upon the institution is the jealousy of the women...the idea is so generally distasteful to the present state of human nature that, as we might anticipate it is rarely possible to realize it".[3]

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1. Nnamdi Azikwe, My Odyssey: An Autobiography, op.cit. p.24. The author later changed his mind, and became "almost convinced that polygamy may be a better system of marriage designed for moral-living humanity, if all claims to moral-living can be realised without any hypocrisy". ibid., p.25.

2. See Obafemi Awolowo, My Early Life, (Lagos: Nigeria, John West Publications Ltd., 1968), pp.22-23.

3. Kimball Young, Isn't One Wife Enough, (New York, Henry Holt and Co., 1954), p.80; see also Basden, Niger Ibos, op.cit. p.237; Shorter, op.cit.p.174.

The natural tendency of humans to entertain feelings of jealousy was restrained and stifled by the advantages which, in traditional society accrued to women from the practice of polygamy. The fact that polygamy was the normal mode of life of people of prestige in the society also helped to alleviate feelings of jealousy aroused among the wives.

In modern society, the advantages of polygamy, as far as women are concerned, have largely disappeared, and jealousy, no longer saturated with compensations, coalesce with the subtle tincture of odium now attached to the status to render the modern woman an incompatible companion in polygamy.

(11) Men's attitudes. Men in traditional society favoured polygamy.[1] In addition to the prestige and economic value of many wives, there was also the ability of the husband of multiple wives to be independent of the tantrums of a disgruntled wife. "When one fails, another will minister to his needs", says Basden. "One wife may be at variance or physically unfit but another will serve him equally well".[2]

The attitude of men in modern society towards polygamy is lukewarm, even in the rural areas.[3] There are still a few men who assert a preference for polygamy, but usually they are men who have no personal experience of the practice. An interesting feature of the whole

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1. See Basden, Niger Ibos, op.cit. pp.227-228.
2. Basden, Niger Ibos, op.cit. p.232; it is nevertheless not unknown for a husband with many wives to be forced to cook for himself because all his wives have refused to do so. One informant in Eket narrated the case of a man who refused to sleep with, or eat the food cooked by his third wife. His two other wives who felt that he was unfair to the third wife refused to cook for, or sleep with, him, on the ground that it was not their turn. The embarrassed husband was forced to capitulate and to give the third wife her share of his affection.
3. See Galletti, Baldwin and Dina, Nigerian Cocoa Farmers, op.cit, p.78.

situation is that those with personal experience of polygamy are often also the advocates of monogamy, while some monogamists appear as advocates for polygamy - for example Burton, of whom it is said "there is no more rigid monogamist in existence than the traveller who in theory is an inveterate polygamist".[1] While he advocated and defended polygamy, he himself never practised it. On the other hand, Chief Ozo of Oroko town in Nsukka, who claimed to have had five wives at one time, was particularly emphatic about the evils of polygamy. After an interview with the present writer when asked what message he had for the women of Nigeria, he replied "Tell Nigerian women to behave themselves so that their husbands would not take additional wives". He recounted his experience of the problems involved in a polygamous marriage, and denounced it as an undesirable practice, although previously he had five wives, and at the time of the interview still had two of them living with him.

C. The attitudes of the Churches

It is not feasible to deal comprehensively here with the various attitudes of the Christian Churches towards African polygamy, and reference should be made to the excellent treatises[2] and monographs[3] which deal with

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1. Frances Hitchman, Richard E. Burton, His Early Private and Public Life (London: Sampson Low, Marston, Searle and Rivington, 1887), Vol.II, p.256.

2. See Phillips, Survey of African Marriage and Family Life, op.cit. pp.335-359; Hastings, Christian Marriage in Africa, op.cit; David Barrett, Schism and Renewal in Africa, 1968, op.cit; James Webster, The African Churches Among the Yoruba, 1888-1922, (Oxford, Clarendon Press, 1964); Mullin, The Catholic Church in Modern Africa, op.cit.

3. e.g. Hillman, Polygamy Reconsidered: African Plural Marriages, op.cit; Trowell, The Passing of Polygamy, op.cit.

the topic.

The policies of the churches with regard to polygamy show some slight variations, but generally they refused to baptise a polygamist unless he had first put away all but one of his wives, usually the first wife he had married. For example, Phillips reports of Roman Catholic discipline concerning marriage in Africa as follows:

> "The first marriage, though contracted under native law and custom, is considered a full binding marriage. When conversion takes place, the first marriage is the only binding one unless the casus apostolicus (1 Cor. vii. 10-16) comes into force. In case the first wife deserts her husband because he has become a believer, he may marry whom he wishes, but a new Christian marriage has first to take place. If the wives of an unbeliever wish to become Christians, only the first one may be baptized and the others have to leave him. A polygamist who refuses to let his wives go, except the first one, may not be accepted as a catechumen and may be baptized only in exceptional cases upon his death-bed".[1]

Macfarlan asserts, with some justification, that in "nothing was the early work of the missionaries more marked than in their endeavours to raise the position of women".[2] The contribution of the missionaries to women's education has been previously noted,[3] and in later chapters, their attacks on many social and legal injustices against women will be mentioned. Unfortunately, however, in a few instances, the religious policies of the missions imposed hardships and injustices on the very women they were

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1. Phillips, Survey of African Marriage, op.cit. p.355; see also Hastings, Christian Marriage in Africa, op.cit. pp.9-10, 11; Eugene Stock, The History of the Church Missionary Society, (London: 1899), Vol.III, p.111; Vol.II, p.646; see also J.B. Webster, "Attitudes and Policies of the Yoruba African Churches Towards Polygamy", in Christianity in Tropical Africa edit. by C.G. Bäeta, (London: Oxford University Press, 1968), p. 225.
2. McFarlan, Calabar, The Church of Scotland Mission, op.cit. p.61.
3. See above, Chapter II.

trying to protect. The policies of the Missions relating to polygamy are illustrative.

During field-work for this thesis quite a few women interviewed had been abandoned by their husbands in conformity with the policy of the Missions that a polygamist could not be baptised unless he had divorced all but the first of his wives.[1] The intensity of hostility against the Churches shown by these women provide some evidence of the hardships and sufferings this policy imposed on them. In some communities, discarded wives of polygamists found it difficult to remarry, and in cases where they were fortunate to remarry, they invariably contracted less favourable marriages than their previous ones, due no doubt to depreciation in their social status.

The present policy of the Christian Churches in Nigeria continue to exclude a polygamous husband and his additional wives from becoming or remaining even as catechumens. If they are already baptised, no positive action may be taken against them, although probably they would not be permitted to take communion, or allowed to hold or retain any office in the Church.[2]

9. Conclusion

A. Types of marriage in Nigeria in the future

Controversies as to the types of marriage suitable for future generations are not confined to Africa, but they are intensified on the African continent because of the present legal recognition of polygamy in many of the countries, and the existence of several kinds of marriages

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1. See Kingsley, Travels in West Africa, op.cit. p.212, who reports the pathetic story of an old Chief with three wives, who as a result of conversion to Christianity, believed that exclusion from holy communion meant eternal damnation; he did not wish to reject any of his wives, and since none of the ladies would consent to marry him, if the others were sent away, "he worried himself to a shamrock".

2. See generally, H.W. Turner, History of an African Independent Church: The Church of the Lord (Aladura), (London, Oxford University Press, 1967), Vol.1.

in the same legal system. For example, in Nigeria, in addition to monogamous marriage under the Marriage Act, customary laws and Islamic law permit polygyny, but the latter limits the number to four legal wives,[1] while the former allows unlimited number of wives. If, therefore, polygamy is advocated, the further question arises whether any limit on the number of wives should be imposed.

Writers are consistent in asserting a decline in the practice of polygyny in Africa,[2] and this is certainly true of all parts of Nigeria.[3] The factors operating to hasten this decline have already been noted. To reiterate briefly, they are, inter alia:

(i) the educational and social emancipation of women;
(ii) the high cost of maintaining a large family, even in rural areas;
(iii) the mechanization of farming methods, negativing the need for intensive manual labour;
(iv) the growth of alternative avenues for expenditure, for example, improved housing, luxurious cars and other consumer commodities;
(v) a definite shift in the symbols of prestige from the large family of many wives and children to educational and material achievements.

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1. See further, below Chapter IX.

2. See e.g. Ohadike, op.cit., p.391; Hastings Church and Mission in Modern Africa, op.cit. p. 171; Trowell, op.cit. John C. Caldwell, Population Growth and Family Change in Africa: The New Urban Elite in Ghana (Canberra, Australian National University Press, 1968), p. 71.

3. See Elias, The Nigerian Legal System, op.cit. p.296; Uka, op.cit. p.14; Larson, Changing Marriage Patterns in West Africa, op.cit. p.240.

TABLE 4:3. PREFERRED FORM OF MARRIAGE FOR NIGERIA IN THE FUTURE

Answers given in response to the following question: What form of marriage would you advocate for Nigeria in the future?

(a) polygamous marriage (more than one wife at a time);

(b) monogamous marriage (one husband or wife at a time);

(c) polyandrous marriage (more than one husband at a time).

		Number interviewed	Below 30 yrs. (a)	Below 30 yrs. (b)	30 yrs. - 50 yrs. (a)	30 yrs. - 50 yrs. (b)	Above 50 yrs. (a)	Above 50 yrs. (b)	Totals (a)	Totals (b)	Percentages (a)	Percentages (b)
Onitsha	Men	58	Nil	11	3	16	5	23	8	50	13.8	86.2
	Women	106	1	26	6	30	10	33	17	89	16	84
Nsukka	Men	40	1	7	5	22	Nil	5	6	34	15	85
	Women	31	1	17	Nil	5	1	7	2	29	6.5	93.5
Ibadan	Men	27	Nil	2	3	5	7	10	10	17	37	63
	Women	49	Nil	17	2	20	1	9	3	46	6.1	93.9
Ejigbo	Men	7	Nil	1	Nil	2	3	1	3	4	42.9	57.1
	Women	31	Nil	3	3	14	2	9	5	26	16.1	83.9
Students	Men	65	5	58	Nil	2	Nil	Nil	5	60	7.7	92.3
	Women	51	2	47	Nil	2	Nil	Nil	2	49	4	96
		465	10	189	22	118	29	97	61	404		

TABLE 4:4. PREFERRED FORM OF MARRIAGE BY AGE GROUPS

Age Group	Preferred form of marriage	
	a	b
Below 30 years	5	95
30-50 years	15.7	84.3
Above 50 years	23	77

From Tables 4:3 and 4:4 it can be seen that no one expressed a preference for polyandry and, while women were generally quiescent about it, may men denounced it as "a sin against God and man", "an abomination", and "real prostitution". One male interviewee was of the opinion that "the women will not favour it".

The reasons given in favour of polygyny included: "It is the custom of our ancestors"; "it gets rid of surplus women"; "I have seen it run well"; and "a woman who is an only wife gets swollen-headed". The reasons generally given against polygyny were "jealousy of the wives", and the "high cost of maintaining a large family".

B. Should polygamy be abolished by legislation?

Elias, in 1963, noted "the growing awareness of the evils of polygamy among the rising generation of educated youth and their willingness to accept the discipline which monogamy imposes",[1] and he concluded: "these new social values will soon make it necessary for the law to be called upon to frown upon polygamy as an institution".[2]

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1. Elias, The Nigerian Legal System, op. cit. p.297.

2. Ibid., p.297.

The vital question is: Should polygamy in Nigeria now be abolished by legislation? The pertinent point made by Read that "law reform as an instrument of, or catalyst in, social change must be finely calculated if it is not to confuse still further an already complicated system",[1] must not be forgotten in this context.

Some governments have abolished, or restricted the practice of polygamy in recent years.[2] Others, notably Tanzania, have effected a compromise by allowing parties to opt for either polygamy or monogamy.[3] Since the introduction of statutory Marriage, Nigerians have always had the freedom to choose the type of marriage they prefer. Unlike the present position in Tanzania, however, which allows a couple who are monogamously married to convert their marriage to a polygamous one whenever both spouses jointly decide to do so, conversion in this manner is not possible in Nigerian law.

Nwogugu argues the case for the provision of conversion similar to that of Tanzania to be introduced into Nigeria. He says:

> "Is there not a case for providing for the possible conversion of a monogamous marriage into a polygamous one if the parties so desire? This position has in fact been achieved in Tanzania where it is

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1. James S. Read, "Women's Status and Law Reform", in Changing Law in Developing Countries, edit. by J.N.D. Anderson, op.cit. p.215.
2. See Norman Anderson, Law Reform in the Muslim World, (London: The Athlone Press, 1976), pp.61 et al., and 110-114; Coulson, Succession in the Muslim Family, op. cit., p.15; see also Poon v. Tan [1973] 4 Family Law Report, 1974, p.161, legal concubinage was abolished in Singapore in 1961, when the Women's Charter of Singapore was passed.
3. See The Law of Marriage Act, Act No. 5 of 1971, S.11(2); for the general policy and the legal aspects of the implementation of the policy of the new Tanzanian Act, see James S. Read, "A Milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania, 1972, J.A.L. Vol.16, No. 1, pp.19-39, at pp.23, 25.

> now possible under the law to convert a monogamous marriage into a polygamous one if both parties agree to the change. In this way the parties will be given the freedom to determine what type of relationship they wish to maintain at any given time".[1]

It is respectfully submitted that the writer has ignored the fact that in Tanzania, the freedom of the spouses to convert their marriage at any given time is not absolute, since a marriage which is in fact polygamous cannot be converted into a monogamous one. In other words, conversion from monogamy to polygamy is possible, but not vice versa.

In any case, the legal freedom of spouses to change the nature of their marital relationship at will augurs ill for the status of marriage and for its future stability. Marriage is approximated with ordinary commercial contracts by such a provision. Entry into marriage entails certain expectations, which condition the attitude of the spouses to the relationship. If these expectations can, at any moment, and with minimum effort, be changed, the spouses lack the assurance of security. He, or more probably she, may act to minimise any possible detrimental effect, which may result from a change. To illustrate, a woman who enters into a monogamous marriage may be prepared to make financial and other sacrifices, in the expectation that the chief beneficiaries of her efforts will ultimately be her own children. If, however, there is the possibility that, through a conversion to polygamy, this expectation may be defeated, she will be tempted to adopt a less responsible attitude, - an attitude which may be detrimental to that unity and trust which are the essential foundations of a good marital relationship.

The fact that the wife's consent would be necessary to effect a conversion is no answer to this argument, for what Read points out in another context is

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1. E.I. Nwogugu, "The Position of Women in the Changing Family Law in Nigeria" in a Year to Remember, op.cit. pp.101-102.

equally applicable here: "pressure of various kinds may operate in different degrees, much of it not even realized by the person concerned",[1] to influence her free consent.

C. Recommendations

Because of economic and other difficulties which accompany the practice of polygamy in the present society, especially among the less privileged families, monogamy is proposed as the most suitable form of marriage for Nigeria at its present stage of economic and cultural development. The use of legislation to effect the change is not, however, advocated. Polygamy should be allowed to atrophy and die a natural death. From the data given above, there is some evidence that this venerable institution, which has served generations of forebears, but which has become almost an anachronism in modern Nigeria, is gradually being replaced by monogamy in some parts of the country.[2]

As will be seen later when marriage according to Islamic law is discussed, a significant proportion of the people in the Northern States continue to practise polygamy.[3] It would be unwise to enact a law abolishing polygamy unless the law can be effectively enforced, and this is not feasible at present.

Although, as previously mentioned,[4] the right of freedom from discrimination entrenched in the Constitution of Nigeria, 1979, may affect the practice of polygamy in specific cases, it is not a suitable tool for

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1. Read, "Women's Status and Law Reform", op.cit. p.226.
2. See Larson, "Changing Marriage Patterns in West Africa," op.cit. p.240; Ezeife, "The Sociology of Ibusa Community," op.cit. p.47; Lieber, Efik and Ibibio Villages, op. cit.,p.16; Caldwell, "Decline of Polygamy in Urban Areas," op.cit. p.248.
3. See further, Chapter IX, pp.29-37.
4. See above, Chapter II, p.149.

the abolition of polygyny. In fact, it can equally be used to maintain polygamy, and equality between the sexes, guaranteed under the Constitution, can be effectively secured by extension to wives of the right to practise polygamy.

A better method than legislation of dealing with polygyny is to increase the level of education of women. It is not possible to practise polygamy without the co-operation of women, and there is evidence that educated women do not readily tolerate polygamy.[1]

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1. See Olusanya, "The Educational Factor in Human Fertility", op.cit. p.356. Education of wife...,is closely associated with the type of marriage contracted. Wives without education who contracted their marriages under the Marriage Ordinance are only a small 2.6% of all wives without education in contrast to 100% for wives with University education. Cf. J.C. Caldwell, Population Growth and Family Change in Africa, (Australia: Australian National University Press, 1968), pp.34-36.

CHAPTER V

FORMATION OF MARRIAGE (I)

> "The laws of most countries are far worse than the people who execute them, and many of them are only able to remain laws by being seldom or never carried into effect. If married life were all that it might be expected to be, looking to the laws alone, society would be a hell on earth".
>
> John Stuart Mill -"The Subjection of Women".[1]

1. Introduction

Polygamy and its effects on the status of women have been discussed in the last chapter. This chapter examines the legal aspects of formation of a customary marriage particularly relevant as indices of the legal status of women.

Although there are considerable variations in the precise rules which govern a customary marriage in the various systems of law in Nigeria, each system distinguishes clearly between a union regarded as a valid legal marriage, and other relationships, for example, concubinage.[2] What are the basic legal essentials which must be present to qualify a union as a valid legal marriage? Precise requirements vary from community to community, and there are few basic essentials which can be stated as applying to all communities in Nigeria, but in most customary law systems, the following qualify for consideration as essentials of a valid marriage:

1. capacity to marry;
2. consents to marriage;
3. payment of "dowry" (marriage consideration);
4. marriage ceremonies;
5. cohabitation.

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1. 1861, (London: Everyman's Library, 1974), Chapter II, p. 249.
2. See above, Chapter III, p.198-200.

These essentials of marriage will be discussed with particular reference to the status of women. Where there are significant variations in the laws of the various communities, the discussion will take the following form:

(a) Yoruba law;
(b) Igbo law;
(c) The law of the other communities.

2. Capacity to Marry

Capacity to marry may involve:

(i) personal capacity - the capacity of each prospective spouse to contract a valid marriage; and
(ii) interpersonal capacity - the capacity of the parties to marry each other.

Personal Capacity

The main determinants of personal capacity to enter a customary marriage are:-

(i) the age of marriage;
(ii) initiation ceremonies;
(iii) physical and mental fitness.

A. The age of Marriage

The general rule among the overwhelming majority of communities in Nigeria is that neither infancy nor old age is a bar to marriage.[1] In most communities, a marriage can be contracted at any time from birth to death. In some communities, marriages can be contracted before birth, usually in the case of women, and even after death, invariably in the case of men.

"Child-marriage" was a significant feature of customary marriage in most traditional societies in Nigeria.

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1. See Customary Law Manual, 1977, op.cit.,p.211, for some exceptions to this rule among Igbo communities.

A compilation of the age of marriage among the communities in the Southern States of Nigeria made by Talbot, the ethnographer, in the early 1920's, shows that first marriage of adult women was the exception rather than the rule.[1] Talbot notes that the Biromm Bafumbum (a semi-bantu tribe), of Southern Ikwerre, an Igbo community, two sub-groups of the Boki, and the Tiv, are the only peoples in Southern Nigeria who generally wait until the women are adults before a marriage is contracted. At least five of the communities normally contract a marriage for their children before birth.

Among the communities in the Northern States, "child-marriage" is found in nearly all groups, especially where the community has been converted to Islam.[2]

"Child-marriage" has been recorded as an institution in most traditional societies in various parts of the world at some period of their history. For example, under English common law, boys could legally be married at the age of fourteen and girls at twelve,[3] but "the Church sometimes performed the pathetic farce of child marriage even on babies in arms, usually to guard against an estate reverting to the crown under Feudal law".[4] Turner has reported several cases of child-marriages from the diocese of Chester (England) as late as the sixteenth century:

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1. See Talbot, Peoples of Southern Nigeria, 1926, op.cit., Vol.III, Table 15, pp.460-467; see also Esenwa, "Marriage Customs in Asaba Division", op.cit., p.76; Mockler-Ferryman, Up the Niger, op.cit.,p.38; Dennett, Nigerian Studies, op.cit., p.165.
2. See further, below, Chapter IX.
3. William Blackstone, Commentaries on the Laws of England, op.cit.,Bk.I, Chapter 15, p. 436; Pollock and Maitland, History of English Law, op.cit.,Vol.II, pp.389-392; "At the age of seven years a child was capable of consent, but the marriage remained voidable so long as either of the parties to it was below the age at which it could be consummated", - p.390; see also Joseph Jackson, The Formation and Annulment of Marriage, 2nd.ed., (London: Butterworths, 1969), p.26.
4. Joseph Braddock, The Bridal Bed, (London: Robert Hale Ltd., 1960), p.35; Maitland and Pollock, The History of English Law, op.cit., Vol.II, p.390-392.

> "At the age of three John Rigmarden was married to a bride of five. Borne in the arms of a clergyman, he had to be coaxed to repeat the marriage words. Before the end, the wilful John announced that he would learn no more that day. The priest replied: "You must speak a little more and then go play you.... Eleven year old John Bridge, bedded with a girl a year or two older lay with his back to her all night, which offended her. On the wedding night of Ellen Damport, aged about seven, two of her sisters lay between her and ten year old John Andrews; and since that time he never lay with her nor never had carnale dole with her".[1]

Braddock observes that:

> "child-marriage laid itself open to abuses and to thoughtless cruelty from the husband. Yet everywhere it was considered quite natural".[2]

The reason usually given for child-marriage in traditional societies was that the only sure way of protecting a girl's chastity was to marry her off before puberty.[3] Women were thought to be naturally libidinous, and after reaching puberty it was assumed that a girl would somehow find a lover, however carefully her parents tried to guard and protect her; once her virginity was lost she was, in many societies, usually unmarriageable, and both a disgrace and often a serious economic liability.[4] Another

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1. E.S. Turner, Child Marriages, Divorces and Ratifications etc. in the Diocese of Chester, A.D. 1561-6, edit. by F.J. Furnival, (London: Early English Text Society, 1897), Original Series, pp.1-52; G.M. Trevelyan, English Social History, (London: Book Club Associates, 1973), pp.68-69; Willystine Goodsell, A History of Marriage and the Family, (New York: MacMillan Co., 1934), p.475; Richmond and Hall, Child Marriages, 1925, pp.56-57; who estimated, with the aid of four census reports made between 1890 and 1920, that approximately 343,000 women and girls living in the U.S. in 1924, began their married lives as children; see the American case of State v. Sellers [1926] 134 S.E. 873, where a child of 11 years lived with her husband; the marriage was held voidable, not void, in view of the Constitution, art. 3, par. 33, and Civil Code 1922, paras, 5531-5533.
2. Braddock, The Bridal Bed, op.cit., p.36.
3. See Rhoda L. Goldstein, Indian Women in Transition : A Bangalore Cast Study, (New Jersey: The Scarecrow Press, Inc. 1972), p.52.
4. See Braddock, op.cit., p.35.

reason for child-marriage in some societies, for example, Nsukka in Anambra State, is the imbalance between male and female, (the females being less than males); the practice of polygamy made it necessary to secure a bride as early as possible.[1]

Before discussing the age of marriage in the various Nigerian communities, it is necessary to examine the legal difference between "child-marriage" and "child-betrothal". Was there a legal difference between betrothal and marriage in traditional Nigerian societies? Under the common law, agreements to marry are binding contracts provided there was intention to enter into legal relations.[2] In Nigeria, it is still possible for parties to sue for the breach of a contract to marry under the common law.[3] A betrothal, or contract to marry, however, does not confer a legal right to consortium, nor to any of the incidents inherent in a statutory marriage. In R. v. Mwela Chinkupe,[4] a Rhodesian case, it was held that for adultery to amount to provocation, sufficient to be a defence to a charge of murder, the woman concerned must be the lawful spouse of the accused; it was not sufficient to show that she was merely engaged to be married or is the mistress of the accused. There are similar decisions of the English courts which draw a clear distinction between the legal effects of a contract to marry, that is a betrothal or engagement,

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1. See also Anthropological Report...Edo-Speaking Peoples op.cit., Part I, p.57.

2. Bessela v. Stern [1877] 2 CP.D.265; Gamble v. Sales [1920] 36 L.T.R. 427; cf. Wiedman v. Walpole [1891] 24 Q.B.537. Breach of contracts to marry are no longer actionable in English Courts - see "Law Reform (Miscellaneous Provisions) Act, 1970".

3. See e.g. Martins v. Adenugba [1946] 18 N.L.R. 63; Uso v. Iketubosin [1957] W.R.N.L.R. 187; Ugboma v. Morah [1940] 15 N.L.R. 78. See further below, Chapter X.

4. [1963] 5 N.R.L.R. 276; but see Banda v. The People, Zambian Court of Appeal, Judgment No. 17 of 1973 where it was held that finding a girl-friend in the act of adultery is sufficient provocation to reduce conviction of murder to manslaughter; see Zambia Law Journal, 1974, Vol. 6, p.129.

and a marriage.[1]

In most systems of customary law, however, the legal boundaries between betrothal and marriage, whether of children or adults, seem less clear than it is under the common law, and it is often difficult to decide whether "child-marriage" or "child-betrothal" is involved in any particular case. This difficulty is compounded by the fact that among most communities, although a marriage may be contracted by, or on the behalf of a child, the marriage is not actually consummated until the girl has reached the age of puberty, usually evidenced by her first menstruation.[2]

Most writers have identified marriage with consummation of marriage, and if the "husband" is not legally entitled to have sexual intercourse with the girl before puberty, or does not usually have sexual relations before this time although legally entitled to do so, they refer to the contract as "betrothal" rather than marriage.[3] Accordingly, many writers maintain that what was prevalent in traditional Nigerian society was "child-betrothal" and not "child-marriage".[4] Thus in the well-known case of Edet v. Essien,[5] where the plaintiff claimed that he had married the woman concerned when she was still a child, Obi contends that it was not a case of child-marriage, but only child-betrothal.[6] In other words, the plaintiff had only

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1. See e.g. R.v. Greening [1913] 3 K.B. 846 C.C.A; killing of a woman with whom the accused was cohabiting on finding her in a house of ill-fame was held to be murder. See also D. Mendes, "Criminal Law", in A Century of Family Law" edit. by R.H. Graveson and F.R. Crane, (London: Sweet and Maxwell, 1957), p.173.

2. See Meek, Law and Authority...,op.cit.,p.271; Basden, Niger Ibos, op.cit.,p.180; Bradbury and Lloyd, The Benin Kingdom, op.cit.,pp.49, 154; Forde and Jones, The Ibo and Ibibio-Speaking Peoples..., op.cit.,p.18; Nwogugu, Nigerian Family Law, op.cit.,p.41; Dennett, Nigerian Studies, 1910, op.cit.,p.165; Leith-Ross, African Women, op.cit., pp.96-97.

3. See e.g. Fadipe, The Sociology of the Yoruba, op.cit., p.78; Bascom, The Yoruba of South-western Nigeria, op.cit., p.59; Obi, Modern Family Law, op.cit., pp.115-117; Ajisafe, The Laws and Customs of the Yoruba People,op.cit., p.55; Nwogugu, Nigerian Family Law, op.cit.,p.49; Esenwa, "Marriage Customs in Asaba District", op.cit.,p.72, Leith-Ross, African Women, op.cit.,p.99, n.1.

4. Obi, Modern Family Law, op.cit., pp.115-116, 186-187.

footnotes 5 and 6 continued.....

agreed to marry the woman when she grew up to adulthood. The writer gave no evidence or arguments to justify his conclusion, but there is evidence to show that child marriage did exist,[1] and still does exist in many areas of Ibibioland, including the area where all the parties to that case belonged.[2] It is therefore difficult to say, without direct evidence to the contrary, whether a mere betrothal or a marriage is involved in any particular case. Mrs. Talbot, in her account of Ibibio women says:

> "Infant betrothal and marriage are not uncommon. In the latter case the baby bride usually lives with her husband's family, but, save in very rare instances, her youth is respected by him. Should the contrary be proved against a man his conduct is regarded as reprehensible, and the girl's family can claim her back without returning the dowry".[3]

The writer records many cases where children actually lived with their husbands.[4] Her findings were confirmed by informants in Eket during field-work for this thesis. It was stated by all informants that no contract regarding marriage is made for a child before its birth, but a marriage can be contracted at any time after birth.[5]

Footnotes 5 and 6 continued.....
5. [1932] 11 N.L.R. 47.
6. Obi, Modern Family Law, op.cit., pp.186-187, 115-116.

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1. See J.C. Cotton, "The Calabar Marriage Law and Custom", 4 J.A.S., 1905, pp.427-430 at p.427; D. Amaury-Talbot, Woman's Mysteries of a Primitive People, 1915, op.cit., pp.88-92; Bride Price Committee Report, 1954, p.42.
2. See Bride Price Committee Report, 1954, p.42; "Child marriage occurred, though it is less prevalent now. It took place where there was an old friendship between two families. It was also the practice where a father wss in difficulties to give away his daughter in marriage while still a child in order to secure the help and assistance of the husband".
3. Amaury-Talbot, Woman Mysteries of a Primitive People, op.cit., p.88.
4. Ibid., pp.88-92; see also Meek, Law and Authority, op.cit., p.271.
5. During field-work a few of the older women interviewed at Eket stated that they were married as children; some of them lived in the homes of their husbands' family.

Usually, the marriage ceremonies are completed when the girl is eight to nine years of age, when she invariably joins her husband's household. Once in her husband's household, she is regarded as his wife, even though he is not expected to have sexual relations with her until she has undergone the "fattening rites" to make her fit for motherhood.

Many cases recorded at Eket Customary Court revealed instances of "child-marriage" where the brides actually lived with their husbands. A recent example is the case of Udo Atake Charlie v. Udo Ubom and Ors.[1] The plaintiff claimed £30 damages against the defendants for "retaining the plaintiff's wife named Essien Ubom, thereby depriving plaintiff of her services and conjugal rights since one and a half months now".

He admitted that the "wife" was not mature, and stated that he would not have carnal knowledge of her, since he had married her for his son who was still at school. The girl, the defendant's daughter, had been living with the plaintiff after the marriage and "performing services" for him. The defendant reported to the police that the girl had been stolen by a cyclist and sold to the plaintiff. The Magistrate had ordered the return of the girl to her father. The plaintiff complained that the girl had been taken away without him enjoying her services, and that his dowry had not been refunded.

The Customary Court held that the defendant had no case to answer, since it was the husband of the girl who could have instituted an action for conjugal rights, and not the plaintiff, who was the husband's father. The important point to note here, however, is that the Customary Court did not deny the conjugal rights of the husband, even though the girl was allegedly only eight to ten years old. In other words, the Court recognized the fact that child-marriage was a legal institution in Ibibio

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1. [1970] Suit No. 164/70, unreported, Eket Customary Court.

customary law. It is not possible, therefore, to agree with Obi that Edet v. Essien[1] was only a case of child-betrothal. The report of the case does not state whether the wife had ever lived with the plaintiff as his wife or not. It simply stated that he had paid dowry for her when she was a child. Without more positive evidence it is respectfully submitted that no conclusions can be validly drawn.

Certain communities have distinguishing words for a girl who is betrothed, and one who is married, that is, one who has had sexual relations with her husband. For example, in certain Igbo communities, specific names given to a betrothed girl are not used to refer to a girl who is married. In Nkanu (Igbo) a betrothed girl is referred to as Nwagbaw, while a girl who is married is ikusi or nne-wayin.[2] Similarly, Yorubas refer to a betrothal as isihun or ijohun, while marriage is known as igbeyawo.[3] Sometimes a certain style of dress, or hairstyle, habitually worn by married women who live in their husband's houses, are forbidden for betrothed girls living with their parents. For example, in Onitsha, while the former used two wrappers, the latter used only one, as unmarried girls also do.[4]

In view of the variations in the age of marriage, and the legal consequences of a betrothal,[5] as distinct from

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1. [1932] 11 N.L.R. 47.
2. See Talbot, Peoples of Southern Nigeria, op.cit., Vol.III, p.447.
3. See Fadipe, Sociology of the Yoruba, op.cit.,p.72; Johnson, History of the Yorubas, op.cit.,pp.113, 114.
4. Information obtained at Onitsha during field-work reveal that this distinction is not rigidly adhered to in contemporary Onitsha society.
5. On betrothal in customary law among Nigerian communities, see generally, Talbot, Peoples of Southern Nigeria, op. cit., Vol.III, pp.426-458, and esp. Table 15 pp.460-467; Basden, Among the Ibos of Nigeria, op.cit.,pp.315-220; Esenwa, op.cit.,p.76; Meek, Law and Authority...,op.cit., p.268; Obi, Modern Family Law, op.cit.,pp.103-136; Bradbury and Lloyd, op.cit.,pp.48 and 49 and 156; Meek, A Sudanese Kingdom, op.cit.,pp.376-378; de St. Croix, The Fulani of Northern Nigeria, op.cit.,pp.39-41; Meek, Northern Tribes of Nigeria, op.cit., Vol.II, p.94.

a marriage among the various Nigerian communities, especially in traditional societies, the discussion on the age of marriage will be further treated under three headings:

(a) the age of marriage among the Yorubas;
(b) the age of marriage among the Igbos;
(c) the age of marriage among the other communities.

(a) The age of marriage among the Yorubas

The position in Yoruba customary law is that, although there are two distinct ceremonies involved in a marriage, the girl is considered to be the wife of the man as soon as the engagement ceremony is performed, regardless of her age. Consequently, all the legal incidents of a marriage, except cohabitation, are enforceable by either party.

This is so although the idana (dowry) has not been paid, or the wedding ceremony, the formal handing over of the girl to her husband, been performed. Thus Fadipe, discussing claims established by marriage, says:

> "...the celebration of Ijohun marked the formal betrothal of boy and girl. Without this ritual the girl was not considered engaged to the boy, and no claim for damages lay open to him in case of her adultery with someone else. From the time of the ceremony, however, the boy became the oko (husband) of the girl, while the girl became his iyawó (bride)".[1]

Elaborating further he noted that

> From the time of the formal betrothal as marked by the isihun celebration until the day on which the girl entered the threshold of her husband's house to assume the sexual and domestic functions of the partnership, a period of ten years normally elapsed. The boy usually abstained from having sexual intercourse with his fiancee for this length of time, although the ceremony of isihun was held to have given him exclusive right to her sexual attention, and a remedy lay for him against any man who betrayed the girl from that day onward."

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1. Fadipe, The Sociology of the Yoruba, 1970, op.cit., p.73.

This opinion is reinforced by Ajisafe, who notes that as soon as "Ijohun is paid the girl becomes the wife of the man", who thenceforward is liable to pay a share towards all funeral expenses which his wife may incur, or to help her parents financially, wherever necessary.[1] In other words, his financial obligations to his "betrothed" and her family comes into operation as soon as the betrothal ceremony is performed. He may also enforce all his legal rights as a husband.

Ellis, however, states that "girls of the better classes" were almost always betrothed when mere children. "Betrothal confers upon the male all the rights of marriage except consummation, which takes place shortly after the girl arrives at puberty".[2]

If the right of consummation is conferred on betrothal as averred by Fadipe and Ajisafe, there is no justification for drawing a distinction between "child-marriage" and "child-betrothal", even though in actual practice, the Yorubas rarely hand over the bride to her husband before puberty, and may sometimes postpone the handing-over ceremony until several years after puberty.

The evidence indicates that among the Yorubas, there is no legal distinction between betrothal and marriage, and that although marriage of a woman could take place from birth onwards, the usual age of consummation of marriage for most Yoruba girls, was eighteen or more years. The usual age for consummation of a child-marriage was the age of puberty, evidenced by commencement of menstruation.

There is scant evidence of child-marriage among the Yorubas in modern society. Marris,[3] in his research

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1. A.K. Ajisafe, The Laws and Customs of the Yoruba People, (Lagos, Nigeria: C.M.S. Bookshop, 1924), p.55; see also Bascom, op.cit., p.60.

2. Ellis, The Yoruba-Speaking Peoples..., op.cit., p.183; Compare Dennett, Nigerian Studies,1910, op.cit.,p.165, who notes that girls were given in marriage as babies, and Bascom,op.cit., p.59, who says girls were often betrothed at five years of age and sometimes before birth. Cf. Fadipe, op.cit., who says the usual age of betrothal was 10; see also Temple, Notes on the Tribes, p.103.

3. Peter Marris, Family and Social Change in an African City: A Study of Rehousing in Lagos, (London: Routledge

footnote 3 continued.....

in Lagos in 1961, found that only one of the householders interviewed had actually married a girl before puberty, and he was a Hausa trader, twenty-five years old, who was born in Lagos.

Of the eighty Yoruba women interviewed during field-work for this research, the average betrothal age recorded was 11.2 years, while the average age of consummation of marriage was 19.7 years. The minimum age of marriage recorded was 10 years, but only four women lived with their husbands below age 15.[1] A curious feature was that the average marriage age was highest among the women above fifty years old, which seems to indicate that Yoruba women are marrying at an earlier age than they were in the traditional society. In 1849, Bowen[2] noted that Yoruba women were not married until they were eighteen or twenty years of age. As shown on Table 5:1, the women over fifty years old who were interviewed, recorded an average age at marriage of 22.4 years, those between 30 and 50 years, 19.5 years; but the youngest age group were married at the average age of 17.1 years.

Olusanya,[3] in a study of two areas in Ibadan, shows that the mean ages for wives with no education was 17.6 years, whereas for those with university education, it was 24.9 years. Ohadike's[4] study of 596 married women in Lagos, in 1964, shows similar differentials between educated women, and others with little or no education. White-collar

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Footnote 3 continued.... and Kegan Paul, 1961), p.45; Child-marriage is popular among the Hausas of Northern Nigeria; see further, below, Chapter IX.

1. See Table 5:1 below, p.381.
2. Bowen, Central Africa, op.cit.,p.286; see also Temple, Notes on the Tribes, op.cit.,p.103 who notes that Northern Yoruba women are usually married at ages, 18, 20, or even 25.
3. P.O. Olusanya, The Educational Factor in Human Fertility, op.cit.,p.360, Table XII.
4. P.O. Ohadike, "A Demographic Note on Marriage, Family and Family Growth in Lagos, Nigeria", in The Population of Tropical Africa, edit. by Caldwell and Okonjo, op.cit., Table 2, p.383.

TABLE 5:1

AVERAGE AGES OF BETROTHAL AND MARRIAGE OF FEMALE INTERVIEWEES ACCORDING TO AGE-GROUPS

	Women below 30 yrs.			Between 30-50 yrs.			Above 50 yrs.		
	Number Interviewed	Average betrothal age	Average age of marriage	Number Interviewed	Average betrothal age	Average age of marriage	Number Interviewed	Average betrothal age	Average age of marriage
Igbo women	45	17.5	21.3	41	10.2	17.4	51	7.1	14.7
Yoruba women	20	12.7	17.1	39	11.3	19.5	21	9.6	22.4
Students	49	19.1	20.7	2	13.9	18.9	Nil	Nil	Nil

workers recorded a mean age at marriage of 23.1 years, craft and other workers 20.8, traders 19.6, and women with no occupation, 19 years. The average age of time of marriage for all groups of women recorded by Ohadike was 19.8 years.

The evidence seems to indicate that not only is there a differential of the mean age of marriage between age groups, but also a considerable variation between the socio-economic groups.[1]

(b) The age of marriage among the Igbos

Child-betrothal among the Igbos in the traditional society was almost universal, and among many Igbo clans betrothal took place before birth.[2] The Customary Law Manual states that "neither infancy nor old age is a bar to marriage".[3] There are a few local variations. For example, marriage between a man and an infant girl is not recognized as a valid marriage in some clans in Afikpo Division, and in Etiti, Mbano, Nkanu and Oguta Divisions.[4]

The Manual states that a woman is invariably betrothed to a man before she is married to him, and betrothal gives the man the legal right to live with the woman as husband and wife in a number of societies, including Owerri, Udi and Arochukwu and fourteen other Divisions. He is also entitled to any child born to his "betrothed" whether or not he is the child's natural father, in more

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1. See Ohadike, op.cit., p.382, and Table 2, p.383; see also P.O. Olusanya, Socio-Economic Aspects of Rural Urban Migration in Western Nigeria, (Ibadan: Nigeria: Nigerian Institute of Social and Economic Research, 1969).
2. See Talbot, Peoples of Southern Nigeria, op.cit., pp.460-467; Forde and Jones, The Ibo and Ibibio-Speaking Peoples of South-Eastern Nigeria, op.cit., p.18. Basden, Niger Ibos, op.cit., p.219; Meek, Law and Authority....", op.cit., p.270. Leith-Ross, African Women, op.cit., pp.96-97; Nwogugu, Family Law in Nigeria, op.cit., p.41; Thomas, Anthropological Report of the Ibo-Speaking Peoples, op.cit., Part IV, p.61 et al.
3. Customary Law Manual, 1977, op.cit., p.211.
4. Ibid., pp.225-227.

than twenty-five out of the thirty-nine Divisions in Anambra and Imo States.[1]

> "Under Ibo law and custom, the girl is technically the man's wife from the moment the first payment is accepted by the parent or guardian...If she be young as a great number are when affianced she will make periodical visits [to her husband's house] staying, as a general, but not binding, rule about two weeks at a time. During the course of the visits she may, or may not, cohabit with her affianced husband; in the eyes of the people they are legally man and wife".[2]

Basden's statement was not supported by informants at Onitsha. Older informants stated that according to traditional Onitsha law, it was not legally permissible for the fiancé of a girl to have sexual relations with her during these ritualized visits (ye uri). She was usually protected by the women of the fiancé's household, among whom she was obliged to sleep.[3]

The purpose of the visits was to give the man's family an opportunity to observe the behaviour of the girl, in order to judge whether she had the qualities required of a good wife.[4]

In 1915, pressure from missionaries caused the Obi and Ndichie of Onitsha to declare a law prohibiting these visits.[5] Informants attributed the reason for the prohibition to the fact that young men took advantage of the visits and had sexual relations with their future brides. It seems, therefore, that betrothal did not confer a legal right to have sexual relations, in Onitsha community.[6]

Although child marriage was not legally prohibited in Onitsha, its occurrence was relatively rare in comparison with other Igbo communities, for example, Nsukka, Nnewi, Owerri and Aba where the Bride Price Committee found

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1. Ibid., pp. 225-227.
2. Basden, Niger Ibos, op.cit., p.219.
3. Information obtained by recorded interviews at Onitsha by the present writer during field-work.
4. See Meek, Law and Authority in a Nigerian Tribe, op.cit., p.272; Nzimiro, Studies in Ibo Political Systems, op.cit., p.108; Jordan, Bishop Shanahan of Southern Nigeria, op.cit., p.220; Spörndli, op.cit., p.116.
5. Nzimiro, Studies in Ibo Political Systems, op.cit., p.108.
6. Some of the older informants stated that a ceremony referred to as ime ife aru (asking for the parents of the girl to consent to sexual intercourse) if performed before marriage, gave the betrothed husband a right to sexual intercourse before the wife was formally handed over to him. Once the girl had sexual intercourse with

footnote 6 continued.....

child-marriage still existing in 1956.[1] Bosah says that child-marriage is regarded with contempt in Onitsha, and that a girl reaches marriageable age at fifteen years, while a boy becomes an eligible bachelor at twenty.[2]

Of the wives interviewed at Onitsha, only one Onitsha indigene said she lived permanently at her husband's house from childhood. She stated that she was handed over to her husband at the age of ten years and lived with him as his wife from then on. She was about fifty-five years of age at the time of the interview. There were quite a few wives who had been married, and had lived with, their husbands when they were children, but they were all women from other Nigerian communities who were married to Onitsha men.

Several of the older Onitsha wives who were married as children came from Anambra Division, and indeed the only cases of child-marriage actually discovered at Onitsha during field-work involved a man from that Division. While interviewing some women at a compound in Umudei village in Onitsha, the precocious behaviour of a little girl, not more than nine to ten years, attracted the attention of the writer. Attempts to exclude her from the group, since the discussion was not considered suitable for a child of her age to participate in, drew ribald protests from the other women that she was also a wife. Closer enquiries revealed that she was actually married to, and living with, a man from Anambra Division. The women of the compound volunteered the information that she was having sexual relations with her husband, but apart from her evident precocity, she seemed to have suffered no visible harm. The women

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Footnote 6 continued.....her betrothed, she was allowed to establish copulative relationships with lovers of her choice. Information given by the Onowu of Onitsha, Chief P.O. Anatogu, in a recorded interview held at Onitsha on 19 July, 1977. See also R. Henderson, The King in Every Man, op.cit.,p.203; Chukwudebe, Onitsha Quo Vadis,1973, op.cit.,p.32.

1. See Bride Price Committee Report,1954,pp.10,24, 25-26.
2. S.I. Bosah, Groundwork of the History and Culture of Onitsha, (N.D.), p.122.

also stated that there was a younger wife (of the same man) who had gone to school. The latter was estimated to be about seven years old. Whether she too was having sexual relations with the husband was uncertain.

Child-marriage is still practised among some Igbo communities in the present society. Social Welfare Officers particularly in Nsukka and Abakaliki, (both Igbo areas) attribute the present instability of family life to forced marriages contracted when the wives were small children. When the wives grow up they invariably refuse to live with the husbands chosen for them, especially when such husbands are very much older.[1]

(c) The age of marriage among other communities

Most of the other Nigerian communities also permit child-betrothal and child-marriage.[2] In the majority of cases, the brides do not live with their husbands before puberty, even though in many cases, there is a legal right of cohabitation.

There is evidence that in quite a few cases in traditional societies, child-wives actually live, and have sexual relations, with their husbands. For example, Thomas, in his anthropological report of the Edo-Speaking peoples of Nigeria, records seeing several wives who had been married for at least three years, but none of whom appeared to have been more than thirteen years old at the time he saw them. He says: "I could not, however, observe the slightest ill-effects of this premature marriage, on the contrary, both young and older wives, appeared to be particularly healthy

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1. See e.g. Progress Report, July-August, 1974, of Nsukka Social Welfare Zone; Bride Price Committee Report, 1954, op.cit.,p.47 et.al; see also Parliamentary Debates, Eastern House of Assembly, Official Report, Vol.II, pp.671-672, 28 March, 1956.

2. See generally de St. Croix, The Fulani of Northern Nigeria, op.cit.,p.41; Mockler-Ferryman, Up the Niger, op.cit.,p.38; Bradbury and Lloyd, The Benin Kingdom, op.cit.,p.121; Ling Roth, Great Benin, op.cit. Tremearne, Tailed Head-Hunters of Nigeria, op.cit., p.232; Wilson-Haffenden, op.cit.,p.265. Cf. Temple, Native Races and Their Rulers, op.cit.,p.62.

and the standard of physical development was a good one".[1] He attributes the scarcity of women as a possible explanation of child-marriage in some areas.

Contrary to the assertion of a few writers that child-marriage is no longer found in Nigeria,[2] there is evidence that it still exists in all parts of Nigeria,[3] and is particularly frequent among Moslem and other communities in the Northern States.[4]

(11) Legislation aimed at preventing "child-marriage".

There is no general legislation prohibiting child-marriage in Nigeria. A few local authorities have attempted to fix the age below which a customary marriage may not be contracted. For example, four Native Authorities in three of the Northern States have fixed the marriageable age for girls in their own areas. The Declaration of Tiv Native Law and Custom[5] relating to marriage and divorce states that a marriage is valid if the woman has reached the age of puberty, while the Declaration of Idoma Native Law and Custom[6] relating to marriage and divorce states that "No woman shall be married unless she has reached the age of twelve years". In Borgu[7] and Biu[8] the prescribed minimum

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1. Thomas, Anthropological Report on the Edo-Speaking Peoples, op.cit.,Part I, p.57; Spörndli, op.cit., p.118; Meek, Law and Authority...,op.cit.,p.271.
2. See Isacc O. Delano, The Soul of Nigeria, (London: Weiner Laurie Ltd., 1937), p.121.
3. See Bride Price Committee Report, 1954; Okonjo, The Impact of Urbanization..., op.cit.,p.152; Forde and Jones, op.cit.,p.18, Gunn and Conant, Peoples of the Middle Niger Region, Northern Nigeria, 1960, op.cit., pp.69, 103 and 123; Gunn, Pagan Peoples of the Central Area of Northern Nigeria, 1956, op.cit., pp.20, 77; see also Emeakuana and Anor. v. Umeojiako, [1976] Suit No. AA/1A/76, unreported, High Court Amawbia/Awka, 15 Oct. 1976.
4. See further, below, Chapter IX.
5. Native Authority (Declaration of Tiv Native Marriage Law and Custom) Order, 1955, Section 2(a).
6. Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order, 1959, Section 2 (1) (a).
7. Native Authority (Declaration of Borgu Native Law and Custom) Order, 1961, Section 2 (1) (a).
8. Native Authority, (Declaration of Biu Native Marriage Law and Custom) Order, 1964, Section 1 (a).

ages for the marriage of girls are thirteen and fourteen years respectively. In Borgu and Idoma,[1] breach of the law is an offence, on the part of the man who "marries" a girl below the prescribed age, and her father or other legal guardian who permits the "marriage" to take place.

In 1954, the former Eastern Region of Nigeria set up a committee to investigate the social effects of the payment of bride-price in the various parts of the Region. During its investigation and visits to the different communities, the Bride-Price Committee found that "child-marriage" was still practised in many areas. Although it was not asked to do so, the Committee made the following recommendation in relation to the age of marriage:

> "Child-marriage should be abolished. No marriage should be valid where either party is below the age of sixteen years. Where either party is below the age of twenty-one years, the consent of the parent or guardian should be required, but this consent shall not be unreasonably withheld".[2]

As a result of this recommendation, The Age of Marriage Law, 1956,[3] was enacted. Section 3 (1) of the Law provides that "a marriage or promise or offer of marriage between, or in respect of, persons either of whom is under the age of sixteen shall be void". The statute does not affect marriages contracted before the passing of the Law.

Any person who "asks, receives or obtains, or agrees or attempts to receive or obtain, any property of benefit of any kind", in respect of a marriage intended

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1. Sections 2(2) Borgu, and 2(2) Idoma.
2. See Report of Bride Price Committee, 1954, p.47.
3. Cap 6, Laws of Eastern Nigeria 1963. This Law as enacted in 1956, stated in section 2: "In this Law "marriage" includes a marriage contracted under the provisions of the Marriage Ordinance and a marriage according to customary law". This provision was altered and confined to customary law only in the 1963 edition of the Laws of Eastern Nigeria. Reference to marriage under the "Marriage Ordinance" in the 1956 Law, was ultra-vires and void, since such marriages are governed by Item 45, Exclusive Legislative List, and the Regions had no power to legislate upon such matters; see Kasunmu and Salacuse, Nigeria Family Law, 1966, op.cit., pp.2-4.

or celebrated between persons either of whom is under the age of sixteen is guilty of an offence.[1] Similarly, a person who "gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon, or for, any person, any property or benefit of any kind, is guilty of an offence".[2] It is a defence, however, for a person charged under the Law if he could prove "that he did not know or did not have reason to believe that the marriage would be void" and that before he did the prohibited acts, he took reasonable steps to verify the ages of the parties to the marriage.[3]

Section 6 of the Law provides:

"6(1) No court shall -

(a) entertain or continue any suit or proceeding; or

(b) pass any decree or order; or

(c) execute wholly or partially any decree or order;

if the claim involved, in such a suit or proceeding or if the passing of the decree or order or if such execution would be in any way contrary to the provisions of this Law.

(2) No court shall, in adjudicating any matter or executing any decree or order, recognize any marriage or promise or offer of marriage, which is avoided by this Law".

In the event of a divorce, section 6 prevents a man who had "married" a girl under the age of sixteen after the enactment of the Law, from reclaiming his dowry or other gifts he paid on the occasion of the "marriage". He is also prevented from enforcing any claims on the children she begets by him, or by anyone else, which he might have had if the Law had not been passed. For example, in Ezie v.Otaka and Anor.[4] the plaintiff sued for recovery of bride-price he had paid on the occasion of his marriage to the second defendant. He claimed that he married her in

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1. Age of Marriage Law, 1956, s.4 (1) (a).
2. Ibid., s.4 (1) (b).
3. Ibid., s.4 (2).
4. [1973] Suit No. MN/35/73, unreported, Nsukka Magistrate Court.

1963, and paid ₦60.00 as bride-price to her uncle, since her father was dead. He stated that the girl formerly lived with him as his wife, but was taken away by her mother on the pretext that the mother needed the girl to do some domestic work for her. The girl's mother, in her evidence, said that the girl's father died in 1960, thirteen years before the suit was heard. When the father died, the first defendant, the girl's eldest brother, was seven years old, and the girl herself only one year, three months old. She denied any knowledge of a marriage between the plaintiff and the second defendant. The Magistrate, Mrs. Obiora, found as a fact that the marriage, if contracted as alleged by the plaintiff, was void under "The Age of Marriage Law". She was satisfied that the first defendant, at the time he gave evidence in Court could not have been more than twenty years old. In 1963, the time of the alleged marriage, he could not have been more than ten years old, and he was older than the second defendant. It was evident that the second defendant at the time of the marriage was therefore under the age of sixteen years.

Counsel for the plaintiff argued that even if the marriage was void under The Age of Marriage Law, the dowry was nevertheless recoverable. The Magistrate rejected their contention: she held that even if dowry had been paid as alleged, it was not recoverable, since the marriage was void.

It is respectfully submitted that this decision is in accordance with section 6 of the Law, and that once a court decides that a marriage is void under The Age of Marriage Law, the court has no further jurisdiction to pursue any claims brought by virtue of the purported marriage. This interesting point arose in the case of Emeakuana and Anor.v. Ume Ojiako,[1] an appeal case heard in the Amawbia/Awka High Court in 1976, from the decision of Magistrate Onyefulu at Aguata.

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1. [1976] Suit No. AA/1A/76, unreported, High Court Amawbia/Awka, 15 October, 1976.

The claim was instituted by the respondent who claimed to be the natural and legal father of a baby girl. He paid dowry for, and performed the ceremony of customary marriage with the second appellant in 1968. The parties lived together as husband and wife until 1972. No children were born before the separation, but after the separation a child was born to the wife on 27 December, 1972. Part of the dowry paid was refunded at the time of the separation. The main disagreement centered around the date of separation, the inception of the pregnancy, and the precise amount of dowry paid and actually refunded. The appellants stated that cohabitation ceased in January 1972. The respondent maintained that it was not until 18 April, 1972, that the separation occurred. The refund of dowry took place late in April, 1972. The appellants said all the dowry paid on the occasion of the marriage had been refunded. The respondent stated that only a part of the dowry had been refunded. The child's birthdate was recorded at the hospital where it was born as 27 December, 1972.

On behalf of the respondent, evidence was given by a Chief of the area to the effect that once a woman became pregnant before she left her husband, or if any part of the dowry remained unrefunded at the time of the conception of a child, the child belongs to the ex-husband, despite the fact that the dowry may have been returned before the child's birth. The Magistrate entered judgment for the respondent as being the natural father of the child, and overlooked the claim for custody. The appellants appealed against this decision.

The Judge, Obi-Okoye, J., found that the purported marriage was void under The Age of Marriage Law, due to the fact that the bride was under the age of sixteen years at the date of the purported marriage.[1] He believed the evidence of the respondent rather than that of the appellants (as did the Court below), and held that the respondent was the natural father of the child. Mr. Okafor, Counsel

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1. The Age of Marriage Law, 1956, s.3(1).

for the appellants, submitted that Igbo customary law does not recognize the natural father of the child of an unmarried woman: the child is legally that of the woman's father. He argued that the invalidity of the marriage created the status of a spinster at the relevant time since the mother of the child had not been married to anyone. The Judge said that the matter was one of evidence, and that there was no evidence of what the custom is in the situation before the Court, viz., where parties have lived together as husband and wife under their customary law; been recognized as husband and wife by relatives and friends, subsequently find that the marriage is not valid. The learned Judge stated that perhaps such a situation is unknown to customary law. He said:

> "Generally Igbo custom abhors illegitimacy or bastardization of children. Invariably in all circumstances the custom awards legal paternity of a child to someone. The parties here have led no evidence of the custom in the circumstances of this case. Decision shall therefore turn on the burden of proof. I do not accept the submission of Mr. Okafor that the invalidity of the union renders the situation analogous to that of a spinster who delivered a child in the house of her father. Here it is the statute, not the custom that declared the marriage void, but the same statute failed to prescribe the status of a child born by a couple whose marriage it nullified. We shall therefore fall back to custom. That a custom invariably ascribes a legal father to a child, postulates that unless a custom is proved to otherwise prescribe, a person who is proved to be the natural father of a child is also the legal father of the child and the onus is on he who challenges the legal paternity of the natural father to prove his contention in custom. If this principle is applied to this case, the onus was on the appellants to prove that by the custom of Ezinifite the respondent who is shown to be the natural father of the child in question is not also the legal father of the child. This burden was not established by the appellants".

The appeal was refused, and custody of the child was granted to the second appellant, the mother, until the child attained the age of seven years, after which custody was to be given to the respondent.

It is respectfully submitted that the legal paternity of the child of an unmarried woman is vested in the woman's father under Igbo customary law. Marriage

deprives a father of the legal paternity of his daughter's children. Contrary to the assertion of the learned Judge, customary law does not prescribe that a person who is proved to be the natural father of a child is also the legal father. As correctly submitted by Counsel for the appellants, once the marriage was declared void the status of the second appellant was that of a spinster. Consequently, a child born to her should be affiliated to her father. The Customary Law Manual states:

> "A child is born illegitimate if it is born of a woman who is not married at the time of the child's conception or birth".

There are no exceptions to this rule. An illegitimate child is affiliated to its mother's father. There are some communities where a man has the right to acknowledge a child born as a result of sexual intercourse with an unmarried woman, usually subject to the consent of the mother's family, and invariably, by performing certain customary rites.

In the above case, it is submitted that the Judge did not consider the effect of section 6 of The Age of Marriage Law. Once the purported marriage was rendered void due to non-age of the bride, the Court should not have continued to entertain the suit, in accordance with section 6(1)(a) of The Age of Marriage Law.

(111) The effectiveness of The Age of Marriage Law=

The Annual Report of the Social Welfare Department of the former Eastern Region, 1958 states:

> "The Age of Marriage Law and Limitation of Dowry Law are both progressive social measures, and under the former the police have been able to take energetic and welcome action and have been instrumental in saving a number of girls from potential slavery".[1]

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1. Annual Report, Eastern Region, Social Welfare Department, 1957-1958, (Enugu: Nigeria, Government Printer), p.5.

The present writer failed to discover any case which involved prosecution under The Age of Marriage Law. Even in cases where the Courts have held that a marriage is void under the Law, they have not directed the attention of the police to the possibility of prosecutions under the Law. There are quite a few cases brought before the courts involving "child marriage", but no reported case of a penalty being imposed for the breach of the Law. Many Customary Courts, and Higher Courts, ignore the provisions of the Law. For example, in the case of Udo Atake Charlie v. Udo Ubom and Ors,[1] where the plaintiff admitted that he had married a child for his son, and claimed the return of his dowry, the Eket Customary Court made no mention of this Law under which the purported marriage was void. Neither the plaintiff nor his son was entitled to claim refund of the dowry they had paid with reference to the purported marriage. The attitude of the Judges may have been due to the fact that before the enactment of this Law, "child-marriage" was recognized under Ibibio customary law. In fact, the Bride Price Committee reported that representatives from Uyo, Eket, and Ikot Ekpene stated that "they were fully satisfied with their marriage system; they desired no change and any Government interference was most unwelcome".[2]

Although there is no concrete evidence, it seems that the practice of "child-marriage" among the peoples of the former Eastern Region has been considerably reduced from what it had been in traditional society; but it is doubtful whether this decrease is due to The Age of Marriage Law.

(IV) The case against child-marriage

During the second reading of the Bill on the Age of Marriage Law 1956,[3] the Minister of Welfare, the mover

1. [1970] Suit No. 164/70, unreported, Eket Customary Court, 14 November, 1970.
2. Report of Committee on Bride Price (Enugu: Nigeria, Government Printer, 1954), p.2.
3. Cap 6, Laws of Eastern Nigeria, 1963.

of the Bill said:

> "This Bill sets a standard for the Region. It is adopted in nearly every civilized country in the world. There are two obvious reasons why marriage between children under the age of sixteen years of age is undesirable. The first is on the grounds of health. A girl under the age of sixteen years should not marry, and as a doctor, I can say that in many cases it could be dangerous for a girl to marry before she is old enough to bear children.
>
> The second reason is that the element of consent is nearly always lacking when one of the parties is under the age of sixteen years of age. Such marriages are, as everyone knows, arranged marriages. The girl is often much too young to know her own mind and if she did she would have no power to contest the authority of her parents".[1]

It is not easily appreciated why a girl aged sixteen should be presumed capable of flouting parental authority in the choice of a husband, while a girl of fifteen or fourteen is not. In other words, what mystical quality of maturity is inherent in age sixteen? The average Nigerian sixteen years old girl is no more capable of defying her parents wishes in the choice of a husband than a twelve or fourteen years old girl is.

Forced marriages, and the perpetration of slavery in the guise of marriage, are discussed later. The pertinent point in the Minister's statement is the alleged impairment of health caused by "child-marriage". What empirical evidence is there as to this fact?

Although the child-wives, noted by Thomas among the Edos,[2] and by the present writer in Onitsha,[3] and Maiduguri[4] did not show any visible signs of physical damage, there is evidence in other countries of the disastrous physical effects marriage, followed by consummation

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1. Parliamentary Debates, Eastern House of Assembly, Official Report 28 March, 1956, p.671.
2. Thomas, "Anthropological Report...Edo-Speaking Peoples," op.cit., p. 57.
3. See above, pp.384-385.
4. See below, Chapter IX, pp.42-44.

at a very early age, can cause.[1] Many writers state that in Nigeria, although there may be "child-marriage", such marriages are not in fact consummated until the wife reaches the age of puberty, usually at fifteen or sixteen years of age.[2] There is, however, evidence to the contrary, and a Nigerian case which came before the English Courts is particularly relevant in showing how illusory it is to believe that men who live with wives below the age of puberty always refrain from sexual relations with them.

In Mohammed v. Knott,[3] the appellant who was a Nigerian Moslem married in Nigeria a girl, then aged thirteen years and two weeks, who was also a Nigerian Moslem. Both parties were Hausas domiciled in Nigeria. They went to London soon after the marriage. The husband was a medical student there. The report states that he was twice her age, had three illegitimate children with another woman before the marriage and had intercourse with the wife Rabi at a time when she had almost certainly not reached the age of puberty. After intercourse with his wife had begun, he slept in Nigeria with a prostitute and contracted gonorrhoea. Within five days of his arrival in England, the husband went to a doctor to be cured. A few days later, he took the wife to a doctor to have a contraceptive fitted. As a result of this visit to the doctor, the doctor took the view that the wife was an extremely young girl, and the matter was reported to the authorities. The Justices, having heard the complaint, ordered that the wife should be committed to the care of the Local Authority. They held that the potentially polygamous marriage was not recognized in England, and accordingly, or alternatively, because she had no parent or guardian in England, she was exposed to moral danger, and was not receiving such

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1. See e.g. the pitiful cases described by Kathleen Mayo in Mother India, (London, 1927), pp.39-65, esp. pp.55-57, 60-63.

2. See Meek, Law and Authority, op.cit., p.271; Dennett, Nigerian Studies, op.cit., p.165; Forde and Jones, The Ibo and Ibibio-Speaking Peoples, op.cit., p.18; Basden, Niger Ibos, op.cit., p.180.

3. [1968] 2 All E.R. 563; [1969] 1 Q. B.1.

protection and guidance as a good parent might be expected to give for the purposes of section 2 of the Children and Young Persons Act 1963 of England. On appeal, it was held that the Justices had misdirected themselves by ignoring the way of life in which the parties to the marriage had been brought up, and had failed to take account of their background and customs in deciding whether a child is exposed to moral danger. The Judge said:

> "For my part, as it seems to me, it could only be said that she was in moral danger if one was considering somebody brought up in and living in, our way of life, and to hold that she is in moral danger in the circumstances of this case can only be arrived at, as it seems to me by ignoring the way of life in which she was brought up and the appellant was brought up".[1]

The learned Judge was of the opinion that it was perfectly possible to make a fit order person in respect of a wife validly married to a husband, and gave us as illustrations, where there had been evidence that the husband had constantly assaulted her, or deserted her, leaving her on the streets of London, a girl who spoke no English. He disregarded the fact that the Justices had found that sexual intercourse before puberty is "something which, if not a crime, is looked on as a serious matter in Nigeria". He held that the police could not prosecute the husband for unlawful sexual intercourse with the wife in England as their marriage was recognized in English law as a valid legal marriage, though he admitted that the suggestion that "every time the appellant in England had intercourse with his wife he was committing a criminal offence" had given him "some trouble".

It is respectfully submitted that the Judge was unduly concerned with his idea of the social conditions in Nigeria regarding child-marriage, and the fact that English law recognizes a marriage which is valid by the law of the parties' domicile. It is difficult to accept that the wife could be in moral danger by constant assault,

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1. Ibid., p. 568.

but not by constant sexual intercourse before puberty, yet the physical and mental damage which could result from assault is no greater than that which could result from pre-puberty intercourse, especially with a gonorrhoea-infected husband.

Intercourse before the wife attains the age of puberty is the criminal offence of rape under the Penal Code Law, 1960[1] operative in the Northern States of Nigeria where both parties came from. Section 282 of the Penal Code provides:

> "282 (1) A man is said to commit rape who, save in the case referred to in sub-section (2), has sexual intercourse with a woman in any of the following circumstances -
>
> (a) against her will
> (b) without her consent
> (c) . . .
> (d) . . .
> (e) with or without her consent, when she is under fourteen years of age or of unsound mind.
>
> (2) Sexual intercourse by a man with his own wife is not rape if she has attained to puberty".

In so far, therefore, as the wife had not attained puberty, the husband was committing the offence of rape every time he had sexual intercourse with her, and was liable to prosecution under section 282 of the Criminal Code Law, 1960.

It is hardly necessary to argue the case against "child-marriage". It is intricately bound up with forced marriage and both produce untold hardship and disaster for some of the unfortunate victims.[2] The United Nations has declared that child-marriage and the betrothal of young

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1. Cap 89, Laws of the Northern Region of Nigeria, 1963.
2. See e.g. Status of Women in India: A Synopsis of the Report of the National Committee on the Status of Women, 1975, pp.42-43; Child-marriage was reported as one of the significant factors leading to the high incidence of suicide among young married women; see also G.M. Wilson, "Homicide and Suicide among the Joluo of Kenya", in African Homicide and Suicide, edit. by Paul Bohannan, (New Jersey: Princeton University Press, 1960), pp.205-206; but see the views expressed in Studies in the Family Law of Islam, edit. by Khurshid Ahmad, (Karachi, India, Chiragh-E-Rah Publications, 1959), pp.145-150.

girls before puberty shall be prohibited. Women should have the same rights as men have to free choice of a spouse and to enter into marriage only with their free and full consent. The recommended minimum age to be adopted in each country was not less than fifteen years, with all marriages being officially registered.[1]

Although the Convention and Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages was recommended to member States for implementation in 1962, as of 30 September, 1966, the Convention was only signed by nineteen member States.[2] Nigeria was not one of the States which signed the Convention initially, and up to the present moment has still not signed it. In fact, in 1973, the rather disturbing case of The State v. Hassan Audu[3] was decided by the Supreme Court of Nigeria.

The respondent, aged 39 years, was charged with the offence of committing rape on a girl aged nine years. Apparently, the girl, who had been hawking mangoes, visited the room of the accused at Gusau, on May 23rd, 1970. The accused promised to buy all her mangoes if she would go to bed with him, which she did. The accused then took off his clothes, went into bed with her and had sexual intercourse with her, in the course of which she was deprived of her virginity. When the accused saw the girl bleeding from her vagina he attempted to wash the blood off. As the

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1. See Universal Declaration of Human Rights, art. 16; International Covenant on Economic, Social and Cultural Rights, art. 10; Declaration on the Elimination of Discrimination Against Women, art. 6; Convention and Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962 and 1965); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956), art. 1.

2. See United Nations Assistance for the Advancement of Women, 1966, p.14; The Supplementary Convention on the Abolition of Slavery....1956, op.cit., as of 30th September, 1966, had sixty-seven States parties to it.

3. [1973] 1 N.M.L.R. 105.

bleeding would not stop, he asked her to go home, while he rode away on his bicycle to his uncle to whom he reported what had happened.

The accused did not deny the charge, and explained that he told the girl to go away, but that the girl came into bed with him and started playing with him in consequence of which he had sexual intercourse with her. This account differed from what the girl herself said. Medical evidence was given to the effect that the girl was nine years of age. The "offence of rape was therefore proved since it is illegal in the Northern States for anyone to have sexual intercourse with a girl under the age of fourteen years with or without her consent".[1]

The trial Judge found the offence proved, but he said:

> "However, on the evidence, I am more inclined to believe that the sexual intercourse in question came about more from the deep love which the accused has for Inno and which love is unmistakably reciprocated by her. For inspite of the damage caused her by the accused through that intercourse, she did not mince her words in declaring in open court that she was prepared to marry him if she would be allowed to do so".[2]

The trial Judge found the accused guilty of the offence and sentenced him to three years imprisonment, but because he was convinced of the deep love of the accused for the girl, and her reciprocal love for him, he suspended the sentence for three years. The prosecution appealed to the Supreme Court.

The Supreme Court held:

"We think that the appellant is right in pointing

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1. S.282(1)(e) Penal Code Law, 1960, Cap 89. Laws of Northern Nigeria, 1963 Contrast this with S.357 of the Criminal Code Act, 1916, Cap 42, Laws of the Federation, 1958 which defines rape as "unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by personating her husband..." See R. v. Kufi [1960] W.R.N.L.R.1, at p.3.

2. The State v. Hassan Audu [1973] 1 N.M.L.R. 105 at p.106.

> out that the learned trial judge has no jurisdiction to impose a suspended sentence under the law of the North-Western State. Of the various types of punishment provided for in section 68 of the Penal Code, there is none for a suspended sentence of imprisonment, although there is provision for imprisonment simpliciter. The Penal Code Code[sic] itself provides in section 283 for imprisonment for life or any less term on conviction for rape; the convicted person may suffer a fine in addition. While in English law the punishment of a suspended sentence of imprisonment has been introduced under section 39 of the Criminal Justice Act, 1967, and although section 13 of the High Court Law of the Northern States provides that the jurisdiction of the High Court of North-Western State is mutatis mutandis the same as that of the English High Court, the (English) Criminal Justice Act, 1967, is not a statute of general application in the North-Western State of Nigeria.
>
> Accordingly, we think that the High Court at Sokoto acted in excess of its jurisdiction by importing the idea of a suspended sentence for which there is no provision in the applicable law. We must, therefore, allow this appeal. The appeal is hereby allowed and the order suspending the sentence is set aside. The sentence of three years' imprisonment imposed on the respondent by M. Muhammend, J., at the Sokoto High Court on June 29, 1971, is hereby confirmed without the qualification of suspension.
>
> The respondent, who appeared in person before us and to whom all the proceedings were duly interpreted by an official interpreter, expressed a desire to marry the girl, now aged eleven years, as soon as her parents would permit. We, however, consider that this factor should not affect our view of the enormity of his crime against a young girl of nine years.
>
> We would, however, add a recommendation to mercy for consideration by the appropriate authorities provided, as he asserted before us, the respondent takes immediate steps towards marrying Inno Garba".[1]

It is pertinent to note that the girl the Court was recommending for marriage was still only a child, eleven years old. The Court may have been influenced by the fact that child-marriages are frequently contracted in the Northern States of Nigeria, as Lord Parker, C.J., evidently was in the case of Mohamed v. Knott,[2] previously

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1. The State v. Hassan Audu [1973] 1 N.M.L.R. 105 at 106.
2. [1968] 2 All E.R. 563.

discussed. The report does not state whether the girl had attained puberty, but at the age of eleven, it is unlikely that she had. In this event, the Supreme Court was ordering a course of action which, if executed, would eventually result in a criminal offence, since marriage is a defence to rape only where the wife is fourteen or more years or has attained the age of puberty.

The Supreme Court was obviously influenced also by the allegedly "deep love" the girl had for the accused. Could there still have been a "deep love" had the girl at the time of the rape been five or two years of age, instead of nine? What is the Court's definition of "deep love"? These are the questions that must haunt every mother, and indeed father, of infant girls. It is sincerely hoped that the "depth of feeling" test is not adopted and applied by Nigerian courts in similar cases of rape.

Law is not a panacea for all social evils, but undoubtedly the law could be a potent factor in influencing public opinion, and a standard by which people could pattern their behaviour. In suitable cases it may provide a yard-stick for the judiciary, to curtail decisions based on sentiment. Had there been a national minimum age for marriage, it is most probable that it would have been higher than eleven since in most systems of Nigerian customary law, the age of puberty is the legal age for consummation of a marriage; the age of marriage is generally held to be at least fifteen years for a girl. The Supreme Court would have found it difficult to order marriage for an eleven years old girl as it did in the State v. Hassan Audu.

(V) Summary

The general rule among the overwhelming majority of Nigerian societies is that infancy is not a bar to marriage. With very few exceptions, child-marriage and child-betrothal were widely practised. The first marriage of an adult woman was relatively rare, and in some societies, a girl could be betrothed before birth. In most societies,

marital cohabitation did not take place until the girl attained the age of puberty, evidenced by her first menstrual period. In a few societies child-brides cohabited with their husbands.

Although the practice of child-betrothal and child-marriage is reduced in contemporary Nigeria, they are by no means extinct, and there is evidence that child-marriage is still practised to some extent amongst most Nigerian societies, especially in the rural areas.

There is no general legislation applicable to the country as a whole, prohibiting child-marriage; a few local authorities have enacted bye-laws stating the minimum age of marriage for women. The Age of Marriage Law of the former Eastern Region fixed a minimum age of sixteen years for either spouse of a customary marriage.

Child-marriage, apart from the fact that it may be physically harmful if consummated before the age of puberty of the wife, contributes to forced marriage with all its attendant evils.

B. Initiation Ceremonies

Among certain communities a man or woman is not usually considered capable of contracting a valid marriage without having gone through certain customary initiation rites. With special reference to women, two rites are usually associated with marriage:

(1) circumcision;
(11) fattening ceremonies.

(1) Circumcision=

In many communities in Nigeria women in traditional society were circumcized,[1] and although the practice is

1. See Basden, Niger Ibos, op.cit.,pp.176-178; Meek, Northern Tribes of Nigeria, op.cit.,Vol.II, p.91;"Meek, Law and Authority...", op.cit.,p.293; Forde and Jones, The Ibo and Ibibio-Speaking Peoples, op.cit.,p.24; Bradbury and Lloyd, op.cit.,p.97; Daryll Forde, Yoruba-Speaking Peoples of South-Western Nigeria, (London: International African Institute, reprint 1969), p.28;

footnote 1 continued.....

much less prevalent now, it is not altogether extinct.[1] The usual method by which women were circumcized was by the removal of the clitoris (clitoridectomy), either during early childhood, or immediately before, or after puberty. Where the operation is performed during childhood, for example, among many Igbo communities,[2] and the Efik of Calabar,[3] it cannot be considered as an initiation for marriage or womanhood. There are some communities, notably the Yorubas[4] and Isokos,[5] where the operation is postponed until the girl is ready for marriage, and may be performed just before she is taken to her husband's home.

Although great importance is attached to circumcision in those societies where it is practised,[6] very few of them require the performance of the operation as a legal essential for a valid marriage; rather it is regarded as a preparation for marriage and motherhood. In a few communities, for example, Oguta town in Oguta Division of Imo State, a marriage is not regarded as legally valid if the wife has not been circumcized.[7]

Footnote 1 continued..... Bascom, op.cit.,pp.61-62; Fadipe, op.cit.,p.79; Bosman, op.cit., p.444; Dennett, op.cit., pp.167-168; Temple, Notes on the Tribes,op.cit., p.105.

1. An Igbo informant in London stated that she had to break off her engagement to an Igbo man from Oguta Division, because she refused to be circumcized. She stated that if they had got married she would not be legally recognized as his wife unless she had been circumcized, and her children would be considered illegitimate. Her own community does not practise circumcision, and she refused to comply.

2. See Talbot, Tribes of the Niger Delta, op.cit.,p.168; Leith-Ross, African Women, op.cit.,p.104; Meek, Law and Authority...."p.293.

3. Antera Duke, Efik Traders of Old Calabar, edit. by Daryll Forde, (London: International African Institute, reprint 1968), p.15.

4. See Fadipe, op.cit.,p.79; Forde, Yoruba-Speaking Peoples, op.cit.,p.28; Bascom, op.cit.,pp.61-62.

5. See Bradbury and Lloyd, op.cit.,pp.154-155; see also Lieber, Efik and Ibibio Villages, op.cit., p.32.

6. See e.g. the Isokos, "where no other event, except possibly the death of a very important man, entails the spending of so much money, time, preparation, and emotion" as female circumcision (Oyao).

footnote 6 and footnote 7 continued....

Although the practice of circumcision is widespread among most of the major ethnic groups, for example, the Yoruba, Igbos, Ibibios and the Edo-Speaking Peoples, it is by no means universal, even among these groups. Onitsha women, old and young, stated emphatically that circumcision of women in any form has never been practised by Onitsha people.[1] Similarly, although most Ibibios practise circumcision of women, often at the time of marriage, Eket women asserted that the practice is unknown there. The practice is fairly general among the Yorubas, but there are also exceptions.[2] There is no evidence that it was ever practised by the Tivs, Nupes, or Igbiras.

Most Missionaries objected to the practice and forbade it among Christian converts.[3] McFarlan maintains that female circumcision was the cause of disease among the Calabar community,[4] and Basden refers to it as a "bad custom", and says: "The operation designated as 'repairs after circumcision' is well known at the hospitals in these latter days".[5]

Although the practice of circumcision is widely

Footnotes 6 and 7 continued.....

6. See also Report of Bride Price Committee, op.cit., p.36.
7. Customary Law Manual, 1977, op.cit.,p.213: In some Igbo areas, it is an offence punishable by a heavy fine for any girl to conceive before she has been circumcized, see Meek, Law and Authority....",op.cit., p.293; see also among the people of Brass Division, of the Rivers State, where it is said that female circumcision is an essential of a valid marriage, Bride Price Committee Report, op.cit., p.36.

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1. See also Basden, Niger Ibos, op.cit.,p.179, n.7; Female circumcision is also not practised in a number of Village groups of Nsukka Division, where Igala influence is strong, see Meek, Law and Authority...."op.cit., p.292.
2. See Bradbury and Lloyd, op.cit.,p.121, although female circumcision is universal among Edo-Speaking Peoples it is not practised at Okpe.
3. See Basden, Niger Ibos, op.cit.,p.178; Meek, Law and Authority....", op.cit., p.293; Leith-Ross, African Women, op.cit.,p.163: McFarlan, Calabar, The Church of Scotland Mission, op.cit.,p.61.
4. McFarlan, op.cit., p.61.
5. Basden, Niger Ibos, op.cit.,p.177.

practised in Nigeria, nobody seems to know the reason for the practice, at least insofar as it relates to women.[1] In the case of men it is said to be an aid to cleanliness, a reason which does not pertain to women's circumcision. Many of the older informants stated that formerly no man would marry an uncircumcized girl. It was alleged that the operation deprived women of sexual desires, or at least such desires were reduced when the clitoris is removed. The virtue of the woman was thus easier to preserve.[2] In the case of men, however, circumcision was supposed to have the opposite effect; it tended to increase their sexual ardour. This is an illustration of the tendency in traditional society to sublimate women's sexual capacity while efforts are made to intensify men's.

The Bride Price Committee[3] stated in its report:

> "We strongly disapprove of the practive of cliterodectomy or female circumcision which obtains in certain areas, particularly in the case of Brass Division where the operation is performed after the age of puberty. However, it is an integral part of native custom in such areas and its sudden abolition would not be acceptable to the people. We wish to recommend, however, that it should be made a punishable offence to circumcize all but the very young and we consider the age limit should be fixed at one month".[4]

This recommendation was not implemented by the Government and no legislation to this effect has been enacted.

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1. See Meek, "Law and Authority....", op.cit.,p.293; Meek, Northern Tribes of Nigeria, Vol.II, op.cit.,p.91; Compare Basden, Niger Ibos, op.cit.,p.417, "Both for male and female, the Ibos, while retaining the rite, have quite lost the reasons for its practice and to all questions reply: 'that it has always been done and we follow the custom of our forefathers'. Beyond that they cannot go although some try to manufacture reasons".

2. See United Nations Economic and Social Council, Economic Commission for Africa: The Position of Women in Kenya, prepared by Julius Carlebach, E/CN.14/URB/9, 16 July, 1963, p.2: in a recent study of juvenile prostitutes in Nairobi, Kenya, it was found that 49.5 percent of women and girls interviewed were circumcized; Cf. Thomas, Anthropological Report...Edo-Speaking Peoples, op.cit., Part I, p.53, noted that "clitoridectomy is practised in all the communities south of Okpe. In Okpe it is known but not practised, and precisely here is the standard of morality higher".

3. The Bride Price Committee Report,1954, op.cit.,p.48.

4. Girls are circumcized at age 15 to 16 years and cases

footnote 4 continued.....

(11) Fattening Ceremonies

Fattening ceremonies were not usually considered a legal essential of a valid marriage. Like female circumcision, in most communities, it was considered a preparation for marriage, and more especially, of motherhood. The practice seems to have been mainly confined to the Igbos,[1] Ibibios[2] and a few other communities in the Eastern States,[3] and was more institutionalised among the Ibibios than among other communities. There is a fair amount of literature which describes the practice,[4] but basically it consisted of a period of seclusion which might range from three months to several years[5] for a girl of marriageable age, depending on the wealth of her parents and her prospective bridegroom. During this period, the secluded girl was made to do no work and was fed on the best food and other delicacies. She had several attendants whose duty was to attend to her every need and to make her look as beautiful as possible. Its main purpose was to make

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Footnote 4 continued..... are said to occur where the operation is performed on girls who are already pregnant, see Bride Price Committee Report, op.cit.,p.36

1. See Basden, Niger Ibos, op.cit., p.223; Meek, Law and Authority...", op.cit., p.271.
2. See P. Amaury-Talbot, Woman Mysteries of a Primitive People, op.cit., pp.82-88.
3. See Bride Price Committee Report, 1954, op.cit.,pp.28, 31, 36, 39, 42; Talbot, Tribes of the Niger Delta, op. cit., pp.172-173; but see C.K. Meek, Tribal Studies in Northern Nigeria (London: Keegan Paul, 1931), Vol.I, p.230; Meek notes that rites of similar character are practised in the most distant parts of the Northern Provinces, e.g. among the Margi of Adamwa Province.
4. See particularly Talbot, Woman Mysteries....", op.cit., 82-88; Talbot, Tribe of the Niger Delta, op.cit., pp.172-175, who notes that fattening ceremonies were essential in some communities, e.g. Okrika, "It is considered a grave crime for a man to induce a girl to yield to his advances before the Iria [Fattening] ceremony has been performed on her behalf". Circumcision of females, on the other hand, is not practised by the Okrikas.
5. See Talbot, Tribes of the Niger Delta, op.cit., p.172; at Akwete in Aba District a period of two years may be passed in the fattening house, and in a neighbouring district even seven years.

her fat and fit for childbirth. Girls were married at a very young age, and were therefore unfit for the arduous task of childbearing. It was thought that excessive feeding would accelerate growth and physical maturity.

The Missionaries[1] objected strongly to the practice in the mistaken belief that the husbands wanted the wives to be fat for sexual purposes. As in the case of female circumcision, it was forbidden among Christian converts. The 104-year old informant in Eket told the present writer that she did not undergo fattening ceremonies, although her slightly elder sister did. Just about the time of her marriage, her family and her prospective husband all became Christians, and so she was not permitted to go into the Fattening-House. She expressed this lost opportunity as one of the greatest regrets of her life, and always looked back on it with sorrow. Asked the reasons why the Missionaries had prohibited the practice, she said she did not know, but suggested that they might have thought it sinful, since a lot of money was spent on the ceremonies. In many places it operated as a sort of "coming out" ceremony so popular in certain European circles, at which prospective suitors were given the chance of meeting the belles of the season and making their choice of wives.

C. Physical and mental fitness

Generally, lack of physical and mental fitness was not, and is not now, a bar to marriage.[2] Under Yoruba customary law, Ekundare states that "no person with unsound mind could negotiate for marriage and neither could a marriage be negotiated on his behalf".[3] Similarly, the Customary Law Manual states that it is not permissible

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1. See Meek, Law and Authority, op.cit.,p.272; Sporndli, op.cit., p.120.
2. See Customary Law Manual, op.cit., p.213.
3. Ekundare, Marriage and Divorce under Yoruba Customary Law, op.cit., p.11.

to marry a woman who is sane on the behalf, or in the name of a person who is insane, nor is it permissible for a women who is insane to be given in marriage to a man who is sane, although it is permissible for an insane man to marry a sane woman during a lucid interval. There are a number of exceptions in each case.[1]

Interpersonal Capacity

D. Consanguinity and affinity

(1) Consanguinity (blood relationship)

Incapacity to marry because of prohibited degrees of relationships vary widely among the different ethnic groups, and even among sub-groups of the same tribe.[2] For example, speaking of the Ekoi, Talbot says:

> "There are practically no marriage restrictions among this people....It is not even forbidden by native law for half brothers and sisters to marry, though cases of this kind are extremely rare".[3]

Among the Edo - Ibibio - Igbo - Igbirra - Yoruba and Ijaw-Speaking peoples, on the other hand, the general rule is that marriage under customary law is forbidden between persons who are related by blood, usually identified by the fact that they both descend from a common ancestor,

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1. See Customary Law Manual, op.cit., pp.212-213.
2. For consanguinity bars generally see, Nwogugu, op.cit., p. 46; Obi, Modern Family Law, op.cit.,pp.168-171; Thomas, Report on The Edo-Speaking Peoples...", op.cit., p.61 et.al; Talbot, Peoples of Southern Nigeria, Vol.III, op.cit., pp.711-717; Meek, Northern Tribes of Nigeria, op.cit.,pp.187-188 and 190-195; Meek, Law and Authority ...", op.cit., pp.259-264; Talbot, Life in Southern Nigeria: The Magic Beliefs and Customs of the Ibibio Tribe, (London: Frank Cass and Co. Ltd., new imp., 1967), p.204; Akiga, Akiga's Story, op.cit.,p.130 et.al; Ward, Marriage Among the Yorubas, op.cit.,pp.10-15; D.A. Ijalaiye, "Capacity to Marry under Nigerian Customary Law", op.cit., p.22.
3. Talbot, In the Shadow of the Bush: A Description of the Ekoi of Southern Nigeria, (London: William Heineman,1912), p.110; see also de St. Croix, The Fulani of Northern Nigeria, op.cit., p.39.

even though several generations removed. Precise rules vary among the different groups as to how far the relationship should be traced. Thus Ellis says of the Yorubas:

> "Marriage is forbidden in the same blood; and as descent is traced on both sides of the house, it is consequently forbidden both in the father's and mother's families, as far as relationship can be traced. This, however, is not far,...As a rule relationship does not seem to be traced further than second-cousins, and the prohibitive degrees of marriage are for a man, mother, aunt, sister, daughter, niece, cousin and second-cousin".[1]

Among the Edo, intermarriage is permissible from the fifth generation;[2] among the Annang (Ibibio) a man could marry his cousin once removed,[3] while among the Igbos generally, marriage with close consanguineous relatives is totally taboo.[4]

There are also variations in the laws of consanguinity observed by the various sub-groups of the same tribe. For example, an Onitsha man "cannot marry any woman from his father's village, even if they are twenty or more generations removed",[5] and he would be surprised to learn that the law is different in other sub-groups, and a man could even marry his brother's daughter in some Igbo

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1. Ellis, The Yoruba-Speaking Peoples, op.cit.,p.188;Contrast Fadipe, op.cit., p.71; the relationship ends at three at Ile-Ife (Meta ni itan tan); Meek, Northern Tribes, marriage between half brother and sister is possible among Northern Yorubas; and Ward, Marriage among the Yoruba, op.cit.,pp.10-11; the prohibition extends to people with a taint of blood relationship in their veins; see also Talbot, People of Southern Nigeria, op.cit., p.713; Talbot, Life in Southern Nigeria, op.cit.,p.204.
2. See Egharevba, Benin Law and Custom, op.cit.,p.12; Talbot, Peoples of Southern Nigeria, op.cit.,pp.713-714.
3. Talbot, Peoples of Southern Nigeria, op.cit.,Vol.III,p.717.
4. See Talbot, Peoples of Southern Nigeria, op.cit., pp.715-717; Customary Law Manual,1977, op.cit.,pp.216-220; E.W. Ardener, "The Kinship Terminology of a Group of Southern Ibo", 24 Africa, 1954, p. 85 at p.95; Basden, Niger Ibos, op.cit., p.215.
5. O.N.B. Chukwudebe, Onitsha: Quo Vadis, (Onitsha Nigeria, Rex Litho Press, N.D.,), p.31; Talbot, Southern Peoples, op.cit.,p.716; E.C.O. Ilogu, Christian Ethics in an African Background,(Leiden: E.J. Brill, 1974), p.24. Ardiner, "The Kinship Terminology for a Group of Southern Ibo", 24 Africa 1954, p.95.

communities. In Chukwu v. Mbah and Ors.,[1] the defendant contended that he married Janet his niece, his brother's daughter. He lived with her from 1952 and had three children (claimed by plaintiff). The plaintiff contended that the defendant could not marry Janet as it was an abomination for a man to marry his niece.

Witnesses for the defendant, including Barrister Nwafor Chukwuami and Chief Daniel Ogbuzulu Nnamani, a former member of the Eastern House of Assembly and Parliamentary Secretary to the Minister of Local Government, testified that it is not an abomination in their area, Mburumbu (Ibo), for a man to marry his niece by their native law and custom. The evidence showed that an uncle can marry his niece if the uncle and the father of the niece are half brothers, not having the same mother. A man can also marry his half sister, provided the mother of the half sister has no male issue for his father. The Judge, Kaine J., accepted the evidence of the witnesses for the defendants, and said:

> "I am of the opinion that there is nothing abhorrent in the custom of the people about marriage. That is their own way of life and this Court is not prepared to disturb it. It may not be decent enough to marry a half sister or a niece or a first cousin but if that is the custom of a people to do so under certain circumstances I do not see why this court should interfere with it".

Similar local departures from the normal rules of consanguinity of an ethnic group can be found in other communities.[2]

Prohibitions which prevent inter-marriage are applied equally to men and women, and as such do not form a feature of the distinctive status of women, but are relevant insofar as they illustrate the disadvantageous position of the modern woman in comparison with her

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1. [1967] Suit No. E/56/63 and [1967] Suit No. E/57/63, unreported; Enugu High Court, 20 February, 1967.
2. See Ijalaiye, "Capacity to Marry Under Nigerian Customary Law", op.cit.,p.22.

traditional counterpart. It is now possible for a woman to fall in love with a man whom she is prohibited from marrying before discovery of the relationship is made,[1] a situation which was extremely unlikely in the traditional society where travel outside the community was limited and marriage was arranged by the families.

Marriage within the prohibited degrees of consanguinity is still not permitted among most communities. A marriage contracted in ignorance of a prohibited relationship is void in certain communities, for example, Aba or Onitsha.[2] In certain circumstances, if the relationship is not too close, it can be severed by the performance of certain rites, for example, by killing a goat.[3]

(11) Affinity (relationship by marriage)

The laws prohibiting a marriage between parties who are related by marriage also show wide variations. In certain communities there are very few bars against the marriage of persons related only by virtue of a marriage. Ellis, speaking of the Yorubas, says:

> "Relationship by affinity has not yet been invented, and a man may marry two or more sisters, aunt and niece, and even mother and daughter, but the last unions do not often occur".4

Similarly, Schwab asserts of Yoruba customary law:

> "Between those who call each other ana (in-law) there are no rules forbidding marriage since a union between a man and another member of his wife's lineage, while not viewed with favour is not prohibited". 5

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1. Young people live and work in towns far removed from their native towns and villages, for example in Lagos, or, Kaduna.
2. See Customary Law Manual, op.cit.
3. Customary Law Manual, op.cit., pp.218-219.
4. Ellis, Yoruba-Speaking Peoples...., op.cit., p.18..
5. See William B. Schwab, "The Terminology of Kinship and Marriage Among the Yoruba," 28 Africa, 1958, pp.301-315 at p.311.

Ijalaiye[1] submits that Schwab's statement is an overstatement, and that there is only one instance when a man may marry his wife's sister: that is in the case of a sororate union which imposes on the kinsmen of a deceased wife an obligation to provide another woman to make good the deficiency or loss. But Schwab's statement is supported by Ellis who was writing as early as 1894.

It is difficult, however, to formulate a principle of law which applies to all communities of a single group, even among the Yorubas.[2] The most that can be safely said is that relationship by marriage is not viewed with the same degree of repugnance as blood relationship is, and that, although in most cases marriages where the parties are related by marriage is permissible under customary law, they are not viewed with favour, and are few in fact.

The customary law of the Igbos show a wide variation in the rules governing prohibited degrees of affinity, and are set out in the Customary Law Manual.[3] While in some communities, for example, Aguata, Etiti and Mbano Divisions, a man has legal capacity to marry his wife's daughter born to another man, in other communities, a man has no capacity to marry two sisters, for example, Onitsha, Nsukka and Enugu Divisions. In all Divisions, a man has no capacity to marry his wife's mother in any circumstances.[4]

Similar variations are found among other Nigerian groups.[5]

C. Inter-tribal and Other Bars

(1) Inter-tribal bars.

There is no evidence of any legal bar to inter-tribal marriages,[6] but traditionally, most communities do

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1. Ijalaiye, "Capacity to Marry...", op.cit., p.23
2. See e.g. Talbot, Peoples of Southern Nigeria, op.cit.,p.713.
3. See Customary Law Manual, op.cit., p.222, par.284(11).
4. Customary Law Manual, op.cit., pp.220-223.
5. See Ijalaiye, "Capacity to Marry", op.cit.,p.23; Forde, Yoruba-Speaking Peoples, op.cit., p.13.
6. See Customary Law Manual, op.cit., p.213, par. 278.

not encourage marriage of their women to men of other communities. This social restriction on inter-marriage may extend to sub-groups of the same tribe, especially if there is a traditional history of warfare existing between them. For example, an Onitsha parent would be extremely reluctant to consent to his daughter's marriage with a man from Obosi, even though they are both Igbo sub-groups.[1]

Many of the parents interviewed during field-work expressed a preference for their children, especially girls, to marry within their own community, that is, their own sub-group, for example, Onitsha or Eket, or Ibadan, and if given a choice, all things being equal, would prefer a woman entirely foreign to Nigeria, than a Nigerian woman from another ethnic group, or a sub-group, of their own tribe.[2] Their reason seems to be that a Nigerian woman from a different community would maintain an attachment to her natal community to the detriment of that of her husband's, in time of crisis, whereas a foreign woman can be totally incorporated into her husband's community.

Although this feeling was justified in a few cases during the Nigerian civil war, many informants stated that they owed their lives to the fact that they were married to women from another community. For example, an Igbo informant from Nsukka married to an Ibibio woman from Oron, stated that when the Nigerian soldiers captured Oron during the Nigerian Civil War, he was hidden by Oron people for weeks, while other Igbos were given up to the Nigerian soldiers. Most of these Igbo men were subsequently shot by the Nigerian soldiers. He felt he owed his life simply to the fact that he was married to a woman from Oron.

Is it possible for a non-Nigerian to marry a Nigerian[3] under customary law? It has been decided in the Nigerian courts that a non-Nigerian has no capacity to

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1. The two communities have a history of hostility marked in recent years by several legal disputes over land; see Customary Law Manual, op.cit.,p.223, p. 285(3).

2. But see Ward, Marriage Among the Yoruba, op.cit., p.11.

3. For definitions of the term "Nigerian" see Customary Courts Edict, 1966, Bendel State, S.17; Western Region Customary Courts Law, 1958, Cap 31, Laws of Western

footnote 3 continued.....

contract a marriage under Nigerian customary law, even if he is domiciled in Nigeria.

In Fonseca v. Passman,[1] a Portuguese national domiciled in Portugal purported to marry an Efik woman under Efik customary law in 1926. Hedges, J., held that the purported marriage was void on the ground that a European domiciled in the country of his nationality has no capacity to contract a valid marriage under customary law. He further stated obiter that it would have made no difference if the deceased had acquired a Nigerian domicile.

Similarly, in Savage v. Macfoy,[2] the deceased, who was born at Freetown in Sierre Leone, settled in Lagos where he acquired a domicile of choice, and married a Yoruba woman according to Yoruba customary law. Osborne, C.J., held that the mere fact of Macfoy having made Lagos his domicile of choice would not necessarily make him subject to, or given the benefit of native law and custom, and his ordinary relations would be governed by English, and not native, law. The learned Judge held that Macfoy's customary union was void on the ground that since he was born in Sierre Leone, and English law applied there, no effect could be given to "a polygamous union which would not be recognized as valid by the laws of the domicile or origin of either party".

This decision and the obiter dictum in Fonseca v. Passman,[3] it is respectfully submitted, are contrary to the rules of private international law of most countries. A person's capacity to contract a marriage is governed by the law of his or her domicile at the time of the marriage,[4]

Footnote 3 continued..... Nigeria, 1959 Revision; Customary Courts Edict, No. 2 1966, Eastern Region, s.11. For a discussion on these definitions see, Keay and Richardson, The Native and Customary Courts of Nigeria, op.cit., pp. 174-186.

1. [1958] W.R.L.R. 41; see also Short v. Morris [1958] 3 W.A.L.R. 339; Nelson v. Nelson [1951] 13 W.A.C.A.248; Re Bethel [1887] 38 Ch.D.220.
2. [1909] 1 Renner's Gold Coast Report, 504.
3. [1958] W.R.N.L.R. 41.
4. See Brook v. Brook [1861] 9 H.L. Cas.193; Warrender v. Warrender [1835] 2 Cl. and Fin. 488, H.L.; Dicey and

footnote 4 continued.....

and the domicile of origin, or nationality of a person is not relevant in determining his or her capacity to contract a marriage. Consequently, Macfoy by virtue of his Lagos domicile of choice had capacity to contract a polygamous marriage, and since he was not debarred under Yoruba customary law from contracting a Yoruba customary marriage, it is submitted that his marriage was valid. In Fonseca v. Passman, since the deceased was not domiciled in Nigeria, his capacity to contract a polygamous marriage would depend on the law of his domicile at the time of the marriage.

(11) Traditional taboos

Certain communities, notably the Igbos, prohibited slaves and their descendants from inter-marriage with free citizens. There were several categories of slaves including:

(a) osu - persons dedicated to certain kinds of juju (shrine) to appease the gods, and the descendants of such persons;

(b) ordinary slaves, to whom various communities gave different names such as ohu, oru, or ume.

Persons who were Osu suffered the worst sort of social and legal discrimination, especially in relation to

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Footnote 4 continued.....

Morris, The Conflict of Laws, op.cit.,pp.258 et al; cf. Cheshire's Private International Law, 9th edit. by P.M. North, (London: Bullerworths, 1974), p.336; "The basic presumption is that capacity to marry is governed by the law of the husband's domicile at the time of the marriage, for normally it is in the country of that domicile that the parties intend to establish their permanent home. This presumption, however, is rebutted if it can be inferred that the parties at the time of the marriage intended to establish their home in a certain country and that they did in fact establish it there within a reasonable time. See also Radwan v. Radwan(No. 2) [1972] 3 All E.R. 1026 where this principle was applied, and Ali v. Ali [1968] p.64; [1966] 1 All E.R. 664; Cumming-Bruce, J., at p.576-577, suggested that both views were tenable and neither concluded by authority; see Hartley, 32 M.L.R. 158.

marriage.[1] The Bride Price Committee, during its investigations of dowry payments, found severe discriminations against persons labelled as osu, ohu or oru, and the descendants of such persons, who were similarly labelled.[2] As a result of their recommendations, the Abolition of Osu System Law, 1956,[3] was enacted by the government of the former Eastern Nigeria. The Law abolished the osu system, and its allied practices, including oru, ohu and ume systems; removed certain social and legal disabilities, for example, incapacity to marry a free citizen (diala, or nwadiana),and prescribed punishments for breaches of the Law.

During the second reading of the Bill of the Abolition of Osu System Law, 1956, several members of the House of Assembly opposed the Bill, and some members, stated that their constituencies had specifically mandated them not to support the abolition of the systems. Many members, for example, Dr. A.N. Obonna of Owerri Division, and Chief N.N. Anyika of Awka Division expressed the opinion that the law if passed, would be unenforceable.[4] Unfortunately, time has vindicated the assertions of these members. Twenty-one years after the enactment of the Abolition of Osu System Law, 1956, the social stigma attached to these unfortunate

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1. See generally, Obi, Modern Family Law, op.cit.,pp.171-173; Basden, Niger Ibos, op.cit.,pp.243-258; Forde and Jones, The Ibo and Ibibio-Speaking Peoples, op.cit.,p.23; Green Igbo Village Affairs, op.cit., pp.23-24, 50-51, 158-159; Arikpo, "The End of Osu?" West Africa, 21 April, 1956, p.201; W.R.G. Horton, "The Ohu System of Slavery", 24 Africa, 1954, p.317-335; Uchendu, The Igbo South-east Nigeria, op.cit., pp.87-90; Sylvia Leith-Ross, "Notes on the Osu System...", 10 Africa, 1937,pp.207-220; Nzimo, Studies in Ibo Political Systems, op.cit., pp.24-29; Meek, Law and Authority, op.cit.,pp.31,203-205.

2. Bride-Price Committee Report, (Enugu, Nigeria, Government Printers, Enugu, 1955), p.48. Discriminations were especially noted at Okigwe and Owerri, where it is alleged the system of osu originated and from whence it spread to other areas, see Basden, Niger Ibos, pp.243-258; Uchendu, "The Igbos...", op.cit., p.89.

3. Cap 1, Laws of the Eastern Region of Nigeria, 1963 Revision.

4. See Eastern House of Assembly Parliamentary Debates, 20th March, 1956, Eastern Debate, Vol.II, pp.399-415.

group of people and their descendants, still remains. Although there are very few reported cases where breach of the Law has been alleged,[1] discriminations remain as stringent as ever.[2]

For example, a young Onitsha woman fell in love with a man who allegedly was an oru. Although he was a suitable person in every other respect, her family were united in their opposition to any marriage between the couple. The girl's father informed the present writer that he would prefer to die, or to see his daughter dead, rather than see her married to an oru. He stated that if such a marriage was contracted, no Onitsha person would marry any member of his family or associate with them. They would all become social outcasts in Onitsha. The views of other Onitsha indigenes confirmed his statements. Everyone appreciated the injustice of the system, but no one was prepared to incur the social ostracism that would result from such a marriage.[3]

The position demonstrates the almost total failure of legislation to effect social changes which involve deep-rooted practices and beliefs. It is hoped that time would eventually prove the Members who opposed the Bill on the ground of its unenforceability wrong, but from available evidence, that time has not yet come.

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1. See e.g. Nwachukwu v. Nnoremele [1956] 2 E.R.L.R. 50 which involved an allegation of slander.

2. See C. Obi Akpamgbo, "Magistrates Courts Law (Amendment) East Central State of Nigeria Edict, No. 23 of 1971", Nigeria Lawyers' Quarterly, Vol.4, pp.133-144 at p.135; A.N. Aniagolu, "Aspects of Customary Marriage and Divorce and Their Incidents Upon Family Life", in African Indigenous Laws, edit. by T.O. Elias; Basden, Niger Ibos, op.cit., pp.243-244; Green, Igbo Village Affairs, op.cit., p. 158-159, n.1.; Uchendu, "The Igbo of Southeast Nigeria", op.cit.,p.90; W. Horton, op.cit., p.334-335; Leith-Ross, "The Osu System," op.cit., p.218.

3. See Horton, op.cit., p.334 "..even Christian parents, I was informed, would never countenance such an alliance. Isaac Mba, court member for Ibagwa and one of the most enlightened men in the area, admitted that he would be horrified at the thought of himself or his children marrying Ohu". Basden notes that a free-born man who has intercourse with an osu girl automatically becomes an osu,

footnote 3 continued.....

3. Consents to Marriage

Two sets of consents are necessarily involved in contracting a customary marriage:

(1) parental consents
(11) the consents of the individuals to the marriage.

A. Parental consents

(1) Introduction

From the definition of customary marriage given above,[1] it is seen that,unlike marriage in "modern" English law, the families of both parties to a customary marriage play an important part, not only in the formation of the marriage, but during its existence, and its termination, whether by divorce or death. The consents of the respective families of the parties involved are therefore a necessary legal element of the marriage.

The word "modern" is used designedly, as in traditional English society, marriage did not portray the spirit of individualism that is its characteristic feature today. In common with other European and Asian countries, in addition to the consents of the bride and groom, that of the kinsmen on both sides were usually also necessary. A contract of marriage, as seen from the description of an ancient English marriage given above,[2] created rights and duties, not only between the spouses, but among the kinsmen, and in fact, the parties who arranged the terms of the contract were not the pair to be wedded, but the bridegroom's kindred and the 'forespeakers of the bride'.[3]

Footnote 3 continued..... see Basden, Niger Ibos, op.cit., p.248; see also Green, Igbo Village Affairs, op.cit., p.158; Meek, Law and Authority, op.cit., p.204, n.1; Leith-Ross, The Osu System Among the Ibo, op.cit., p.216-217.

1. See above, Chapter III.
2. Ibid., p.208.
3. Vinogradoff, Historical Jurisprudence, op.cit.,p.252; see also Pollock and Maitland, History of English Law, op.cit.,p.5; Phillips, Survey of African Marriage, op.cit., footnote 3 continued.....

Child-marriage, as previously seen, is of ancient origin, and the power of families to marry off their offspring existed in most traditional societies.[1] O'Faolain and Martines say of the Greeks:

> "Respectable Greek women were bred for marriage - there was no alternative. A guardian's duty to his ward was to dower and marry her off suitably when she came of age and as many times thereafter as might be necessary. Her consent was not required".[2]

In ancient Roman law, the consents of the paterfamilias were indispensable to the marriage of sons and daughters alike, and where the consent of a parent was needed, it must precede the marriage itself. It was not possible to validate the contract by ratification if the union was preceded by consortium without parental consents.[3] A daughter was permitted to refuse to accede to her father's choice of husband only when he selected someone who was unworthy on account of his habits, or who was of infamous character.[4] Augustan legislation made provision against unreasonable withholding of parental consents, but even to the time of Justinian parental consents continued to be a legal requirement in most cases.

Corbett contends that, neither in the sixth century A.D., nor in the classical period, could a father betroth his son against his will, but he concludes that, despite arguments to the contrary, there is considerable evidence that the paterfamilias had it in his power to play a despotic role in the betrothal of his daughter.[5] Similarly, Lee notes that

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Footnote 3 continued..... p.xv; Radcliffe-Brown and Forde, African Systems of Kinship and Marriage, op.cit.,pp.44-46; Yaotey v. Quaye [1961] G.L.R. 573, 579.

1. See John Stuart Mill, The Subjection of Women,(London: Dent, Everyman's Library, 1974), p.246; "Originally women were taken by force, or regularly sold by their father to the husband. Until a late period in European history, the father had the power to dispose of his daughter in marriage at his own will and pleasure, without any regard to hers".

2. Julia O'Faolain and Lauro Martines, Not in God's Image, Women in History from the Greeks to the Victorians, (London: Temple Smith, 1973), p.15.

3. W.W. Buckland, A Manual of Roman Private Law,(London: Cambridge University Press, 1925), p.67; Maine, Ancient Law, op.cit., p.141.

footnotes 4 and 5 continued.....

"It is likely enough that in early times marriage was a matter of arrangement between the parents on both sides in law as it always might be in fact".[1]

Arranged marriages in China, India, and Japan are sufficiently common in recent periods not to need special comment. The Roman law, which became the basis of legal systems in most European countries, was based on the same hierarchal family system as that of the East. When Japan decided in 1898 to create a new legal system, it took over the Napoleonic Code which was based on the laws of ancient Rome and found that it almost perfectly fitted the conditions of Japanese patriarchalism.[2]

In Russia, marriage was not permitted without the consents of parents, guardians, or trustees, although they were not rendered void if already performed without such consents.[3]

In Ireland, especially in the rural areas, marriage was a contractual affair arranged by the parents or families of the marrying parties,[4] while in France, where arranged marriages have always been numerous, it is not a thing of the past; "there is a whole bourgeois class of solid substance which is keeping it alive", and clubs devoted to such matters still flourish.[5]

Footnotes 4 and 5 continued.
4. Digest XXXIII, 1, 11, 12.
5. Percy E. Corbett, The Roman Law of Marriage (London: Oxford University Press, 1930), pp. 2-4.

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1. R.W. Lee, The Elements of Roman Law, with a Translation of the Institutes of Justinian, 4th edit. (London: Sweet and Maxwell, 1956), p.65, par. 96.
2. David Mace and Vera Mace, Marriage, East and West, (London: MacGibbon and Kee, 1960), p.44; see the interesting comparisons made by Begho between Roman Law and the legal systems of customary laws in Nigeria, Begho, Law and Culture in the Nigerian and Roman World, op.cit.
3. Berman, "Soviet Family Law in the Light of Russian History and Marxist Theory", op.cit., p.26.
4. C.M. Arensberg, and S.T. Kimball, "The Small Farm Family of Rural Ireland", in Sociology of the Family, edit. by Michael Anderson, (London: Penguin Education, 1971, reprint, 1975), p.32.
5. De Beauvoir, The Second Sex, op.cit.,p.451; Marlene Dobkin, "Colonialism and the Legal Status of Women in Francophonic Africa", Cahiers d'etudes Africaines, 31 1963, pp.390-405 at p.393.

These examples are some evidence of the fact that arranged marriages existed in most traditional societies, and justify the conclusion of Engels:

> "Throughout the whole of antiquity marriages were arranged by the parents, and the partners calmly accepted their choice. What little love there was between husband and wife in antiquity is not so much objective inclination as objective duty, not the cause of marriage but its corollary. Love relationships in the modern sense only occur in antiquity outside official society".[1]

In the traditional laws of the great majority of cultures, parental participation in marriage has been the general rule, and the exceptions, if any, have been very few.

(11) The traditional position in Nigeria

The general rule which existed in the traditional societies in Nigeria is that the consent of each family is necessary for the validity of a marriage. Even in cases of elopement, the "marriage" was not usually regarded as valid, until the parents accepted some form of gift from the husband. Acceptance of such gifts acted as retrospective consent. Child-marriage or child-betrothal, as previously seen, was prevalent among most Nigerian communities, and these institutions necessarily involve parental consents.[2]

Before discussing parental consents in the various societies, it is necessary to identify the parental consents necessary for the validity of a marriage. Was it the consents of the fathers of the bride and groom that was necessary, or must the consents of their mothers also be obtained? Must the extended family, or the head of the extended family also consent?

It is difficult to formulate precise legal rules in this respect. Thus Thomas says:

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1. Friedrich Engels, The Origin of the Family, Private Property and the State in the Light of Researches of Lewis H. Morgan, with introduction and notes by Eleanor B. Leacock, (London: Lawrence and Wishart, 1972), p.

2. See above, pp.378-386.

> "the decision appears to rest entirely with the father and mother, their families may be called in but they have no voice in the matter. At Nise [Igbo] I was told that the girl was asked first and if she agreed she was told to go and ask her mother, and if the mother agreed a message was sent to the suitor to come and bring palm wine for both father and mother. On the other hand, when a man marries it appears that he will often consult his elder brother".[1]

The general position seems to be that the families of each party to the marriage were consulted, and invariably, their wishes were respected, but provided the girl's father, or other legal guardian, consented, the marriage was regarded as legally valid.[2] In some Igbo communities for example Onitsha, the consent of the girl's mother was also legally necessary, and in the modern society, the mother's consent to her daughter's marriage remains a legal necessity for the validity of a marriage in Onitsha. In most communities, only the father's consent was legally necessary, although the mother had to be consulted, and her opinion may affect the choice of spouse in actual fact.[3]

In the overwhelming majority of Nigerian traditional societies, the consents of both the man's and the woman's families were necessary for the validity of a marriage which involved payment of dowry, and in this respect reference can be made to the Igbos[4] - Yorubas[5] -

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1. Thomas, Anthropological Report of the Ibo-Speaking Peoples, Part I, op.cit., p.62; see also Fadipe, op.cit.,pp.71-72; Contrast Okpanum v. Okpanum [1972] 2 E.C.S.L.R.561.
2. See Obi, Modern Family Law, op.cit.,p.162; Nwogugu, Family Law in Nigeria, op.cit.,p.44; Cf. Bradbury and Lloyd, op.cit., p.98.
3. See Johnson notes that it is "generally the female members of the family to look out for a wife for their male relatives", see Johnson, op.cit., p.113.
4. See Thomas, Anthropological Report on the Ibo-Speaking Peoples of Nigeria, op.cit., Part I, p.62; Meek, Law and Authority, op.cit.,p.268; H.A. Wieschhoff, "Divorce Laws and Practices in Modern Ibo Culture", 26 Journal of Negro History,1941, p.299; Forde and Jones, The Ibo and Ibibio-Speaking Peoples, op.cit.,pp.17-18.
5. See Ellis, The Yoruba-Speaking Peoples, op.cit.,p.185; Ward, Marriage Among the Yoruba, op.cit., p.21; Johnson, History of the Yorubas, op.cit., p.113; Ajisafe, op.cit., pp.52, 59; Coker, Family Property Among the Yorubas (London: Sweet and Maxwell, 1966), p.262.

Hausas[1] - Fulanis[2] - Ibibios[3] - Edos[4] - Nupes[5] - Tivs[6] - Ekois[7] Igbirras and other communities.[8] The consent of the man's family was especially necessary in the case of his first marriage; in the case of the woman, parental consent was necessary for the first and all subsequent marriages. If the woman's father was dead, the consent of her legal guardian and usually her elder brother or uncle, must be obtained.

(111) The legal effect of a lack of parental consents

An important consideration is the legal effect on the validity of a marriage celebrated without the required consent or consents. Is such a marriage void, or merely voidable?

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1. Meek, Northern Tribes of Nigeria, op.cit., Vol.II, p.94.
2. Meek, Northern Tribes of Nigeria, op.cit., Vol.II, p.94; Stenning, "The Pastoral Fulani", op.cit.,p.386; De Croix, The Fulani of Northern Nigeria, op.cit., p.39-40.
3. Talbot, Woman Mysteries of a Primitive People, op.cit., pp.89-90.
4. See Thomas, Anthropological Report on the Edo-Speaking Peoples of Nigeria, Part I, op.cit.,p.47, who notes that the father of the bride has to pay attention to the views of his elder brother, who may possibly have a power of veto; see also Egharevba, Benin Law and Custom, op.cit., p.15.
5. Forde, Peoples of the Niger-Benue Confluence, op.cit., p.43; Nadel, A Black Byzantium, op.cit., p.358.
6. Akiga, Akiga's Story, op.cit.,p.114-115; Meek, Northern Tribes of Nigeria, op.cit., p.204.
7. Talbot, In the Shadow of the Bush: A Description of the Ekoi of Southern Nigeria (London, Heineman, 1912), p.107.
8. See generally, Temple, "Notes on the Tribes," op.cit., Paula Brown, "The Igbira", in Peoples of the Niger-Benue Confluence, op.cit., pp.67-68; Welch, "The Isoko Tribe", 7 Africa, 1934, pp.160-173; Charles Partridge, Cross River Natives, (London: Hutchinson and Co., 1905), pp.423, 425. Kasunmu and Salacuse, op.cit., p.42.

The Traditional Society

(a) Among the Yorubas

If, despite the lack of parental consent, the man and woman live together as man and wife, the marriage would be regarded as one by "mutual consent only", which, as previously seen[1] was, and still is, a valid legal marriage among the Yorubas. In fact, as noted by Johnson,[2] this type of marriage arose mainly where the girl's parents had refused to give their consent to the marriage, or wanted her to marry someone else.

The parties may elope without the consent of the girl's parents, but Ward[3] notes that although dowry is not strictly payable in such cases, after the elopement, the husband usually "goes to the parents of the girl, prostrates himself before them and begs their forgiveness. He then presents them with a case of gin or its equivalent, in money or in kind".

(b) Among the Igbos

The legal effect of lack of parental consent varies among various Igbo communities, and may depend on whether the person whose consent is required, refuses to give his consent, or was not asked to give his consent, that is, he or she was not consulted about the marriage. For example, in Oguta, where a person's consent is required to a valid marriage, and he or she is asked for, but does not give the required consent, the marriage, once concluded with the necessary ceremonies, will be valid, but where the person was not consulted before the marriage ceremonies are performed, the marriage is void.

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1. See above, Chapter III.
2. See Johnson, History of the Yorubas, op.cit., p.116. Fadipe notes that the popularity of marriage without parental consent is one of the most important changes in traditional marriage customs, see Fadipe, op.cit., p.92.
3. Ward, Marriage Among the Yoruba, op.cit.,p.21.

Where a marriage is performed without the necessary consent, subsequent consent ratifies the marriage, and it will be regarded as lawful from the beginning in Oguta, Abakaliki and many other Divisions, but in Aba, Umuahia, Aguata, and a number of other Divisions, the marriage will only be regarded as valid from the day the necessary consent is given.[1]

The modern society

The modern position as to the requirement of parental consents as an essential of a valid customary marriage is less clear. The changing nature of customary law renders the position rather fluid. Changes in personal laws are difficult to ascertain, but undoubtedly, traditional laws regarding many aspects of customary marriage are no longer being complied with in fact.

To what extent are parental consents still necessary to effect a valid marriage? The law and practice show some variations among the communities, and it is necessary to examine the position:

(a) among the Yorubas;
(b) among the Igbos;
(c) among other communities.

(a) Among the Yorubas

Writers on Yoruba customary law generally agree that in a marriage contracted by payment of dowry the consents of the woman's parents are necessary.[2] In Savage v. Macfoy,[3] decided in 1909, evidence was established that the

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1. Customary Law Manual, op.cit., pp.234-238; see generally, Basden, Among the Ibos of Nigeria, op.cit.,p.69; Basden, Niger Ibos, op.cit., p.215; Thomas, Anthropological Report on the Ibo-Speaking Peoples, Part I, op.cit., p.62; Meek, Law and Authority, op.cit., p.268; Wieschhoff, "Divorce Laws and Practices in Modern Ibo Culture", 26 Journal of Negro History, 1941, p.299; Forde and Jones, Ibo and Ibibio-Speaking Peoples, op.cit., pp.17-18.
2. See Elias, The Nigerian Legal System, op.cit., p.297; footnotes 2 and 3 continued.....

consent of the girl's family is necessary for the legal validity of a customary marriage.

The position has now been changed by statute in some Yoruba areas. For example, the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958 provides as follows:

> "When any parent or guardian of a bride refuses his or her consent to a marriage or refuses to accept his or her share of the dowry, the bride, if she is eighteen years of age or above, and the bridegroom jointly may institute legal proceedings in a competent court against the parent or guardian to show cause why he or she should refuse consent or to accept his or her share of the dowry; and if the court is of the opinion that no sufficient cause has been shown, it shall order that the marriage may proceed without the consent of such parent".[1]

This provision does not specify the procedure for payment of dowry, where a parent refuses consent to the marriage. Should the payment be made to the court, or is payment waived? If payment of dowry is not necessary in cases where the parent refuses his or her consent, there is no significant difference between such a marriage and a marriage by "the mutual consent of the parties only," and there is little to be gained by applying to the court for permission to marry. The Ibadan District Council did not adopt this provision in its own Marriage, Divorce and Custody of Children Bye-Laws. Indeed where a community recognizes "marriage by mutual consent only", as does Ibadan, application for the court's permission to marry is superfluous.

Footnotes 2 and 3 continued.....

2.....Ajisafe, The Laws and Customs of the Yoruba People, op.cit., p.51; Kasunmu and Salacuse, op.cit., p.73; Ekundare, op.cit.,p.12.

3. [1909] Renner's Gold Coast Report, 504.

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1. W.R.L.N. 456 of 1958, s.5.

With reference to the necessity for the man's parents to consent to his marriage, most writers agree that customary law has been modified to the extent that a man may now contract a valid marriage by payment of dowry without the consent of his family.

In Re Sapara,[1] the caveatrix sought to forbid the intended marriage between one Dr. Oguntala Sapara and Sarah Ellen Green on the ground of an alleged prior marriage contracted under customary law between herself and the doctor. She claimed that this marriage was still subsisting, and consequently Dr. Sapara could not legally marry another woman under the Nigerian Marriage Act. Dr. Sapara denied that he was ever married to the caveatrix, on the ground, inter alia, that native marriage was a contract between families, and therefore a man could not marry without the consent of his family. The Judge, Osborne, C.J., accepted the evidence that the doctor's family never gave their consent to the doctor's marriage to the caveatrix, but rejected the proposition that the consent of a man's family to his marriage was a legal requisite of the marriage.

He said:

> "It has been urged that native marriage was a contract between family and family, and therefore that a man could not marry without the consent of his head of the family, though the experts were not agreed that such was the case. If it were so, then it follows that a man who had no family could not marry, yet according to the evidence, he could, and could get some of his neighbours to assist him.... I am unable to accept the proposition, which is contracted by one of the most reliable expert witnesses, that the consent of a man's family is a legal essential to his marriage".[2]

He held that the nexus of the contract of customary marriage was between the man himself on the one side, and the woman and her family on the other.

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1. [1911] Renner's Gold Coast Reports, 605.

2. Ibid., p. 607.

This decision illustrates the changing nature of customary law. Insofar as the evidence, and the judgment indicate that in traditional society, the consent of a man's family was not legally necessary, they cannot be supported. Kasunmu[1] fails to see why a distinction should be made between parental consent of the man and the woman, and various other writers have not lent their support to this view of the traditional customary law of the Yorubas.[2]

It is respectfully submitted that the consent of the man's family was legally necessary, as was the consent of the woman's family, for a marriage by payment of dowry, the usual form of marriage among the Yorubas in traditional society. It is difficult to visualize a man in the integrated and close-knit family system with its patriarchal flavour which operated during the last century in Nigeria, acting unilaterally, or against the wishes of his kin in the acquisition of a wife. The reciprocal nature of rights and duties of the families inherent in a customary marriage negatives such a proposition. For example, when one of the wife's parents died, not only the husband, but his relatives as well, had certain defined duties to perform.[3]

Fadipe rightly stresses the importance of the interest of both families in a marriage and sees it as relating to the "purposes of the relationship and its terms

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1. A.B. Kasunmu, "The Law of Husband and Wife in Western Nigeria", in Integration of Customary and Modern Legal Systems in Africa, edit. by Law Faculty, University of Ife, (Ile-Ife, Nigeria, Africana Publishing Corporation, 1971), p.334.

2. See e.g. Elias, The Nigerian Legal System, op.cit., p.297; Ekundare, op.cit.,p.12; Fadipe, op.cit., pp.71-72; Ajisafe, op.cit.,p.51.

3. See Diamond, Primitive Law, op.cit., p.228; Cf.R.S. Rattray, Ashanti Law and Constitution, 1929, p.26: "It is almost a platitude to state that marriage in Ashanti is not so much between individuals concerned as one between the two groups of individuals whom they represent".

and conditions, the prospects of realising the principal purpose of the union, and the possible consequences - legal, social, economic, political and religious - to the groups concerned with such a union".[1]

But the decision in Re Sapara[2] can be taken as representing a change in the law of customary marriage. In modern Yoruba law there is no doubt that a man's marriage contracted without the consent of his family may be legally valid.[3] Indeed, the Marriage, Divorce, and Custody of Children Bye-Laws of the former Western Region seems to recognize this fact in the provision quoted above. No provision is made for obtaining the consent of the man's family where such consent is withheld.

It should be noted that although parental consent of the woman's family is necessary for her first marriage if contracted by payment of dowry, her subsequent marriages may be contracted without parental consent. The dowry paid by the first husband is repaid to him by the second husband, obviating the necessity of referring to the wife's parents. Such a marriage is known as"marriage by seduction," and involves payment of dowry.[4]

The position with reference to Yoruba customary marriage may be summed up.

In the traditional society the parental consents of either party to the marriage were legally essential,and a marriage contracted without such consents operated as a marriage by "mutual consent only"; insofar as it purported to be a marriage by payment of dowry, it was void. In the modern society, the consent of a man's parents is not legally essential. In the case of a woman, her parents consent is necessary for the validity of her first marriage by payment of dowry. Her subsequent marriages may be legally valid

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1. Fadipe, op.cit.,p.69.
2. [1911] Renner's Gold Coast Report, 605.
3. See Kasunmu and Salacuse, op.cit.,p.73.
4. See Faremilekun and Ors.v. The State [1974] 3 W.S.C.A.86.

without parental consent. Lack of parental consent in both cases operate as "marriage by mutual consent only", which is a valid legal marriage.

(b) Among the Igbos

The law among the various communities varies considerably. The general rule which obtains among most communities is that a man is free to marry without first obtaining the consent of his parents or family head, while a woman must obtain the consent of her parents or other legal guardian to her first, as well as to all subsequent, marriages.[1] There are exceptions in both cases. For example, The Customary Law Manual states that an adult man has no right to marry without the consent of his parents or family head in Onitsha and Udi Divisions, two communities in Nkanu Division, and five communities in Northern Ngwa Division. On the other hand, an adult woman may marry without parental consent, or the consent of her legal guardian in Afikpo, Aguata, Enugu, Etiti, Ishielu, Mbano, Aguta, Okigwe, Orlu, Oru and Owerri Divisions, as well as in many communities in other Divisions.[2]

In Nwinya Ike v. Offia Nwa Una and Anor,[3] Okagbue J., refused to consider as valid a marriage allegedly contracted in accordance with the customary law of the husband, without the consent of the bride's family. He observed:

> "It is trite knowledge that under customary law a marriage can only take place with the consent of the bride's family and that the intended bridegroom must seek the hand of his prospective bride from her

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1. See Nwagugu, Nigerian Family Law, op.cit., p.44; Obi, Modern Family Law, op.cit.,p.162; Basden, Niger Ibos, op.cit., p.215; see generally, The Customary Law Manual, op.cit.,pp.213-216; Thomas, Anthropological Report....Ibo-Speaking Peoples, op.cit., Part I, p.62; Wieschhoff, Divorce Laws and Practices in Modern Ibo Culture, 26 J. Negro History, 1941, op.cit., p.299 Forde and Jones, op.cit., pp.17-18.

2. See Customary Law Manual, op.cit.,pp.234-235.

3. [1974] Suit No. E/1A/74, unreported, Enugu High Court; see also Otaka v. Otaka [1973] Suit No. MN/35/73, unreported, Nsukka Magistrates Court; for the facts see below, p.

people and in accordance with the custom of her people".

There are a few obiter dicta which suggest that marriage is a union between families, and that the consents of both families are necessary for a valid marriage under Igbo customary law,[1] but there seems to be no reported cases where this point expressly came up for decision in Anambra and Imo States. In many cases the consent of the woman's parents was specifically declared to be legally necessary.

The position under Igbo customary law may therefore be stated as follows: it is not legally essential for a man's parents or the head of his extended family to consent to his marriage. The consents of a woman's parents, or that of her legal guardian, are necessary for the validity of her first marriage, and for all subsequent marriages. There are exceptions in each case.

(c) Among other communities

In most of the other communities, a man does not need the consent of his family in order to contract a valid marriage; a woman in order to contract a valid marriage by payment of dowry needs the consent of her parents, or at least her father or other legal guardian.[2] For example, the Declaration of Idoma Native Law and Custom relating to marriage and divorce[3] provides that "no woman

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1. See e.g. Okpanum v. Okpanum [1972] 2 E.C.S.L.R. 561.
2. Contrast and Compare: Philip E. Leis, Enculturation and Socialization in an Ijaw Village (London: Holt, Rinehart and Winston, Inc., 1972), p.86; Meek, Northern Tribes of Nigeria, op.cit., Vol.II, p.94; Stenning, "The Pastoral Fulani of Northern Nigeria", in Peoples of Africa, edit. by Gibbs, op.cit.,p.386; de Croix, op.cit., pp.39-40; Thomas, Anthropological Report on the Edo-Speaking Peoples, op.cit., Part I, p.47; Egharevba, Benin Law and Custom, op.cit.,p.15; Forde, Peoples of the Niger-Benue Confluence, op.cit.,p.43; Nadel, op.cit., p.38; Akiga, Akiga's Story, op.cit.,pp.111-116; Talbot, In the Shadow of the Bush, p.107; D. Amaury-Talbot, Woman's Mysteries, op.cit.,pp.89-90; Temple, Notes on the Tribes, op.cit.; Meek, Northern Tribes, op. cit., Vol.I, p.204; Rosemary Harris, The Political Organization of the Membe, Nigeria,(London: 1965), pp.39-40.
3. N.A.L.N. 63 of 1959.

shall be married unless her father or guardian consents".
Section 5 of the Declaration states:

> "(2) If a woman cohabits against the wishes of her father or guardian with a man who purports to be her husband but is not married to her, the father or guardian may at any time after the commencement of cohabitation demand the bride-price from that man in accordance with sub-paragraph (1) of this paragraph.
>
> (3) After payment in accordance with sub-paragraph (2) of this paragraph the parties shall be deemed to be married".

Similar provisions are found in the local law of other communities.[1] There are no corresponding provisions requiring the consent of the man's family as a legal essential of his marriage.

Decisions of the High Courts of the communities generally confirm that parental consent is necessary for the marriage of a woman. For example, in Obele v. Obele and Ors.[2] the plaintiff, a Master-Fisherman under the Ministry of Agriculture, sought a declaration that the marriage between the first and second defendants be declared null and void. His reason was that before the purported statutory marriage between the two defendants, the second defendant was legally married to him under Epie Attisa customary law, which marriage was still subsisting at the time of the purported statutory marriage between the defendants. The second defendant's father admitted that the plaintiff offered to marry his daughter, but maintained that the offer was not accepted by him or his daughter. Reviewing the evidence, Allagoa, J., said:

> "It is common ground from the evidence led by both parties that the question of marriage is not an understanding reached by the intended husband and the intended wife alone but by the families of both parties....."[3]

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1. See e.g. the declarations of native law and custom of the Biu Federation (N.A.L.N.9 of 1964); Borgu (N.A.L.N.52 of 1961) and generally, see Jeswald Salacuse, A Selected Survey of Nigerian Family Law, (Ahmadu Bello University, 1965), pp.31 et al.
2. [1973] N.M.L.R. 155.
3. Ibid., p.155.

He held that there had been no valid customary marriage between the plaintiff and the second defendant, since there was no evidence that she, or her parents, had consented to the alleged marriage.

The view that a man does not need parental consent for his marriage under customary law in modern society seems to be now firmly established. Since the decision in Re Sapara[1] in 1911, there is no known case in which lack of consent by the man's family has been held to invalidate a marriage under customary law. Indeed, no such case has engaged the attention of the courts since then. On the other hand, there are several cases which have decided that the consent of the woman's family is an essential of a valid marriage. What has been responsible for this discrimination in the legal status of women with reference to parental consent as a legal essential of marriage?

(d) The retention of parental consent as a legal essential for women's marriage

The reasons for the retention of parental consent for women's marriage are mainly due to the peculiar nature of a marriage by payment of dowry, the enhanced economic status of men, and the social attitude of women towards marriage without their parents' consent.

Economic emancipation has freed men from the purse-strings of the family in many cases, and young men are now generally capable of providing the funds for their marriage without the financial assistance of parents. Parental consent may therefore not be necessary to effect a marriage. In fact, a man's ability to finance his own marriage tends to secure family consent where it would have been otherwise withheld. Not many families would be prepared to oppose the wishes of a financially successful son who is generous to them, in the choice of a wife, even in cases where they disapprove of the bride, knowing

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1. [1911] Renner's Gold Coast Reports, 605.

that he could accomplish his purpose without their help. The most the family would offer is advice. Open hostility would be avoided in most cases.

The economic factor coupled with the fact that the majority of law making agencies are composed mainly, or solely, in some cases, of men, have combined to give the man legal emancipation from his family in his choice of spouse, as witnessed by the number of provisions which do not mention parental consent for men's marriage, while retaining and stressing it as a legal requisite in the case of women.

Women have been less fortunate in this respect because of the continued retention, and increasing importance attached to the payment of dowry as a requirement of a valid marriage, and also to the fact that generally speaking, women are more conservative in their attitudes to dispensation of parental consents to their marriage. With the possible exception of Yoruba women, few women are prepared to marry without the consent of their parents. In spite of increased economic independence, women remain doomed to parental eccentricities, according to McFarlan,[1] the favourite being, marrying their daughters to men old enough to be their fathers.

Although legislation has improved the lot of a few women to some extent, quite a number of women are still victims of the traditional law which requires parental consent. The Bride Price Committee recommended that parental consent should only be required for parties below the age of twenty-one years, and such consent should not be unreasonably withheld,[2] but the recommendation was not accepted.

The greatest factor militating against the abolition of parental consents as a legal essential for a woman's marriage is the fact that in most communities a

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1. McFarlan, Calabar: The Church of Scotland Mission Founded 1846, op.cit., p.90.
2. See Bride Price Committee Report, 1954, op.cit., p.47.

customary marriage is not regarded as valid if dowry has not been paid on behalf of the bride to her parents. Dispensing with parental consents as a legal essential of a marriage paves the way for the abolition of dowry as a legal essential.

The Customary Court Judges interviewed by the present writer were almost unanimous in their opinions that a marriage without the consent of a girl's family is not valid. The main reason given was that it is against law and custom, as it jeopardises the payment of dowry to the bride's family, an idea which is repugnant to the customary law of some communities, for example, the Igbos and Ibibios. Dispensation of parental consents would, they declared, eventually lead to the principle that payment of dowry is not essential for a valid marriage.

The social attitude towards payment of dowry will be discussed more fully later, but it is worth noting here that the Bride-Price Committee, after considerable investigation and discussion with many communities in the former Eastern Region, was of the opinion that the time had not yet arrived when the payment of dowry may be abolished, and many communities objected to any interference with their present system of dowry payment.[1]

Whatever the legal position may be as to the requirement of parental consent for the marriage of a man or woman, in actual practice, marriage without the consents of both sets of families is rare, especially where it is the first marriage of the man or woman. Reluctance to marry without parental consent is particularly strong among certain Igbo communities, for example, Onitsha. Parties do live together in a few cases in the urban areas, without marriage, but generally, if the parents' consents (especially the woman's) havenot been given to a union, any purported marriage under customary law, or even a valid statutory marriage doesnot make the parties husband and wife in the eyes of the community.

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1. See e.g. some Ibibio communities, such as Eket, Uyo and Ekot Ekpene Divisions, who informed the Bride Price Commission that "they were fully satisfied with their marriage system, they desired no change, and any Government interference was most unwelcome". - see Bride Price Committee Report, op.cit., p.2.

As noted previously, women are particularly conservative in this respect, and a few women who have asserted their independence and contracted statutory marriages in opposition to their parents' wishes, expressed themselves as "never feeling really married", until such marriages have been ratified by the parents, and the customary formalities observed. Failure to get parental consent subsequently, may lead to marital discord, or even to divorce.

In one case personally known to the present writer, the father refused to give his consent to his daughter's marriage. Since she was over twenty-one years of age, she married the man of her choice under the Nigerian Marriage Act.[1] In spite of the fact that the other members of her family accepted her choice, and recognized the husband, the persistent refusal of the father to speak to her as long as she remained with that husband, was a constant source of worry to her. She often referred to herself as not being properly married, and expressed her feeling of inferiority, since no dowry had been paid for her.[2] While her father is alive no one else could legally accept the dowry on her behalf.

B. The consents of the prospective spouses

Article 16 (2) of the Universal Declaration of Human Rights provides:

> "Marriage shall be entered into only with the free and full consent of the intended spouses".

To what extent are marriages contracted according to customary law in Nigeria entered into with the free and full consent of the prospective wife? There are two aspects to the question involving situations where:

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1. Under the Nigerian Marriage Act, parental consent is not necessary for the marriage of any person twenty-one years or above, see further, Chapter X, pp.168-174.

2. See further, Chapter X, pp.186-188.

(1) child-marriage or child-betrothal has been contracted;

(11) where an adult woman refuses to consent to her parents choice of spouse.

These situations will be examined in traditional and contemporary societies, and as far as necessary differences among the various communities will be pinpointed.

(1) Traditional society

(a) Consent in relation to child-marriage

Child-betrothal and child-marriage have been discussed in the previous section, and only their relation to forced marriage needs comment here.

Child-betrothal and child-marriage, which as previously seen were formerly practised among the great majority of Nigerian communities,[1] invariably entail lack of real consent, since, very often, the girl is too young to appreciate the true nature of the marriage contract. Child-marriage which involves handing over of an infant girl to her husband, was especially vicious, since she had little opportunity of rejecting her parents' choice, at a future date.[2]

In societies where the girl remained at her parents' home until she had her first menstrual period, usually at the age of fifteen or sixteen, she was often given an opportunity to formally accept or reject the husband chosen for her when she was a child. For example, among the pastoral Fulani, child-betrothal was, and still is common, but the girl betrothed as a child, may choose to refuse the lad to whom she was affianced, and the man

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1. See e.g. Ward, Marriage Among the Yoruba, op.cit., pp.17-19; Okonjo, The Impact of Urbanization, op.cit., p.152;Great Britain, Correspondence Relating to the Welfare of Women in Tropical Africa, 1935-1937, CMD 5784, 1938, p.32; Okpanum v. Okpanum [1972] 2 E.C.S.L.R. 561 at 563; and below, pp.440 et.al.

2. See Obi, Modern Family Law, op.cit., pp.161-162.

of her choice then has to recompense the disappointed suitor for the bull which had been transferred to her father when the original betrothal took place.[1]

In other communities, the girl, whatever her age, gives her formal consent to the marriage at the betrothal ceremony. If this was done when she was a child, she is given no opportunity to accept or reject the man chosen for her before she is taken to his home as a wife. Her consent, given as a child, validates the marriage, and any subsequent rejection has no legal effect.

The position among the various ethnic groups may be briefly stated.

Among the Yorubas: Child-betrothal was prevalent among the Yorubas in traditional society. The bride's consent was formally given at the time of betrothal, regardless of her age. Johnson notes that the betrothal ceremony is called isihun and means "formal consent", since at this ceremony the girl and her parents formally consent to the marriage. Although the girl was not usually taken to her husband's home until the age of puberty, there is no evidence that she was given any opportunity to express her disapproval, or otherwise to the marriage, at any stage after the betrothal.[2]

Among the Igbos: Generally, the formal consent of the bride is obtained at the initial ceremony when the boy and his family formally ask for the girl's hand in marriage. She is usually handed a cup of wine during the course of the ceremony. She is expected to take a sip and hand the cup to the bridegroom, or to a member of his family. If she hands the cup to a member of her own family, it means that she does not give her consent to the marriage.[3] In the

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1. De St. Croix, The Fulani of Northern Nigeria, op.cit.p.41.
2. See Johnson, History of the Yorubas, op.cit.,p.113; Forde, The Yoruba-Speaking Peoples, op.cit., p.28; Bascom, The Yoruba of Southwestern Nigeria, op.cit., pp.59-63; Temple, Notes on the Tribes, op.cit., p.103: "A girl is not permitted to reject any husband chosen for her by her parents, except in the case of a man physically or morally unsound".
3. See Chukwudebe, Onitsha Quo Vadis,(Nigeria, Rex Litho Press, 1973), pp.31-32; Elias, The Nigerian Legal System, op.cit., p.290.

case of child-betrothal, or child-marriage, this ceremony was performed while the girl was still a child. In some communities, the girl was given a formal opportunity to ratify or reject the marriage. For example, in Owerri, child-betrothal occurred frequently, However, the girl was generally required to give her consent after she had reached the age of puberty, at the marriage ceremony before she was handed over as a wife to the bridegroom.[1] In other communities, for example Onitsha, the child-wife was given no further opportunity to formally express her opinion about the marriage contracted on her behalf.[2]

Among other communities: The rule also varied among other communities. Child-betrothal or child-marriage had to be ratified by the girl when she became an adult. Among the Ibibios, generally, the girl had to signify her consent during the marriage ceremony, but the child wife was not usually given an opportunity to ratify the consent she is presumed to have given as a child. Among other communities she is given such an opportunity.[3]

Whatever the practice of the community, child-betrothal and child-marriage are obviously conducive to forced marriages.

Another practice which contributed to forced marriages in traditional societies was the widespread practice of pledge, whereby a person may be given as security for the repayment of a debt. Where a girl was given under these circumstances, she may remain after puberty as the wife of a member of her master's household, and the difference between the dowry payable and the amount of the loan was adjusted accordingly. This system

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1. See Bride-Price Committee Report, op.cit., p.25.
2. See generally, The Customary Law Manual, op.cit., pp.234-238; Thomas, Anthropological Report of the Ibo-Speaking Peoples, op.cit., Part I, p.62.
3. See Obele v. Obele [1973] N.M.L.R. 155; Akiga, Akiga's Story, op.cit.,pp.114-116; see also Bradbury and Lloyd, The Benin Kingdom, op.cit., p.156.

necessarily curtailed the girl's freedom of choice,[1] but the greater iniquity of the system was the fact that the length of the service never defrayed the loan and represented only the interest it earned.[2]

(b) Lack of consent by a grown-up girl

It is difficult to state precisely the effect of non-consent by the girl to a marriage arranged by her parents. The available evidence reveals a variety of practices. In some communities, for example among the Yorubas, and most Igbos, the girl had to formally declare whether she accepted the prospective bridegroom, and her consent was considered essential to a valid marriage. Consequently, strenuous efforts were made to force her to accept the man chosen for her. But many writers express the opinion that the girl's consent was not legally necessary,[3] yet these writers also state the treatment meted out to obstinate girls to secure their consent. Among the Tivs, she was allegedly beaten,[4] among the Yorubas she was shut up and chastised,[5] while Talbot records the pitiful case of the young Ibibio girl who, forced to marry her father's choice, preferred death by her own hands.[6]

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1. See Meek, Law and Authority, op.cit.,pp.205; Johnson, History of the Yorubas, op.cit., pp.126-130; Thomas, Anthropological Report of the Ibo-Speaking Peoples, op.cit., Part I, p.62.

2. See Oke Nkwazeme of Nekede v. Ugwanya and Anor.[1943] Suit No. 2/1943, Governor's Court of Appeal, Enugu, where Commissioner F.B. Carr held that it was inequitable for a loan of £19.10, to be still outstanding after more than twenty years service rendered to the lender by the debtor's son and daughter. See also Kuahen v. Avose [1892] Reports of Certain Judgments of the Supreme Court: [1884-1892] Law Reports (Colonial), Nigeria A, Colonial Office.

3. See e.g. Obi, Modern Family Law, op.cit., p.164.

4. See Akiga, Akiga's Story, op.cit., p.166.

5. See Ellis, The Yoruba-Speaking Peoples, op.cit., p.185.

6. Talbot, Woman Mysteries, op.cit.,pp.88-89. A similar, but more recent case occurred in Eket, where it was claimed that a young girl did not like the man chosen for her. She, nevertheless, lived with him and had a

footnote 6 continued.....

The true position seems to be that her consent was not necessary for the validity of the marriage. Girls were usually very submissive and generally accepted the men chosen for them,[1] so that the effect of a girl's refusal on the validity of the marriage rarely had to be considered. In the relatively few cases where the girl was obstinate and refused to live with the man chosen for her, various sorts of pressures, including physical force were exerted in order to secure her compliance.[2]

(11) Modern society

The requirement of the bride's consent as a legal essential of a customary marriage under modern customary law is clearer than it was under traditional law. The consent of the bride is an essential of a valid marriage in modern Nigerian society. Several alleged marriages have been declared void by the courts, where it was proved that the bride had not given her consent to the marriage. As early as 1909, it was accepted by the Court in Savage v. Macfoy[3] that the essentials of a marriage according to Yoruba customary law included the consent of the bride, and in 1943, in Ogunremi v. Ogunremi[4] it was held that the

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Footnote 6 continued..... baby boy. One day, overcome with grief and desperation, she put the young baby on her back and drowned them both in the river. Many cases of forced marriages were recorded in Eket; cf. Esenwa, "Marriage Customs in Asaba", op.cit.,p.74, who notes that forced marriages were in vogue up to the first two decades of this century, but is virtually extinct at the present time.

1. See Basden, Niger Ibos, op.cit.,p.214; Johnson, History of the Yorubas, op.cit., p.113; Akiga, Akiga's Story, op.cit., p.166.

2. Compare Akiga, Akiga's Story, op.cit.,p.166; Ellis, The Yoruba-Speaking Peoples, op.cit.,p.185; Basden, Niger Ibos, op.cit.,p.69; Talbot, Peoples of Southern Nigeria, op.cit.,pp. 455, et.al; Temple, Notes on the Tribes, op. cit., p.145. Compare the position in other parts of Africa - see G.M. Wilson,"Homicide and Suicide among the Joluo of Kenya," in African Homicide and Suicide, edit. by Paul Bohannan, (Princeton: Princeton University Press), 1960, pp.205-6; see Lucy Muir, African Marriage and Social Change (London: Frank Cass and Co. Ltd., 1969), pp. 80-84, 121-124. footnotes 3 and 4 continued.....

consent of both parties to a marriage is a sine qua non of a valid customary marriage. The attitude of the Nigerian courts can best be illustrated by two decisions of the Supreme Court, Egri v. Uperi,[1] and Osamwonyi v. Osamwonyi.[2]

In Egri v. Uperi,[3] the plaintiff claimed the return of his wife, one Lucy Onumerulu Uperi, whom he alleged was being detained by the defendant, her father, despite the plaintiff's demands for her return. In the course of establishing whether a valid marriage according to customary law had been contracted and that Lucy was legally the plaintiff's wife, the Customary Court stated that before marriage can be established according to Isoko customary law the consent of the girl and her parents must first of all be obtained. The court held that the plaintiff did not adduce evidence to show that he had gained the consent of the girl nor her parents, and therefore he had failed to establish a valid marriage.[4] The plaintiff appealed to the magistrate court, but his appeal was dismissed. He further appealed to the Ughelli High Court. The Judge of the High Court held that both the Customary Court and the Magistrate were wrong in holding that no marriage was validly negotiated between the appellant and the respondent's daughter. The Judge said:

> "In my view, when the bride price was fixed and paid and the girl was escorted to the house of the appellant a valid marriage under native law and custom was contracted".[5]

Footnotes 3 and 4 continued.....

3. [1909] Renner's Gold Coast Reports, 504.
4. [1971] 5 U.I.L.R., 446; see also Ezie v. Otaka and Anor. [1973] Suit No. MN/35/73, unreported, Nsukka High Court where a customary marriage was held void on the ground inter alia that the bride was too young at the time of the marriage to have given her consent.

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1. [1974] 4 E.C.S.L.R. 632; [1974] N.M.L.R.22.
2. [1972] U.I.L.R. 527; [1972] 10 S.C.1.
3. [1974] N.M.L.R. 22; [1974] 4 E.C.S.L.R. 632.
4. Ibid., p.23.
5. Ibid., p.24.

The appeal was allowed. The respondent then appealed to the Supreme Court where the judgments of the Customary and Magistrate Courts were restored. The Supreme Court held that the Judge in the High Court was in error in substituting without any justification whatsoever, his own statement of the customary law for those of the Customary Court which is presumed to know the law without requiring that any evidence should be led before it to that effect.

In Osamwonyi v. Osamwonyi,[1] the necessity of the bride's consent was finally and emphatically settled. In this case, the petitioner, a doctor, had gone through a form of marriage with the respondent at Lagos in June 1969, under the Marriage Act. He filed a petition in the Benin High Court, claiming that this marriage be declared void on the ground that at the time the said marriage was performed, the respondent, unknown to him was already legally married to one Patrick Goubadia according to Benin customary law. The plaintiff alleged that at the time the respondent went through the form of marriage with him in 1967, her marriage to Goubadia had not been dissolved.

The respondent denied being previously married to Goubadia. She stated that although Goubadia had paid the sum of £60 to her father on her behalf, it was not with her knowledge or consent; that as soon as she learnt of this payment, she rejected any proposal of marriage from Goubadia and told the latter so. After some abortive attempts to persuade her to change her mind, he abandoned the idea.

There was conflicting expert evidence as to the provisions of Benin customary law in respect of the need for a girl's consent to her marriage. The former President of the Udo Customary Court, Hawdon Uwaifo, on behalf of the plaintiff, stated that under Benin customary law, the consent of a daughter was not necessary. Her father had no legal obligation to get her consent before he gave her

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1. [1972] U.I.L.L.R. 527.

away in marriage. Dr. Egharevba, another expert on Benin customary law, however, on behalf of the defendant, gave evidence which seemed to indicate a view to the contrary.

Uwaifo's evidence was rejected by the trial judge, who found that the requirement of the bride's consent to a proposal of marriage under native law and custom was not only in accord with common sense but also in conformity with the law of the land. He observed:

> "In my view consent is not only basic but fundamental to either a potentially polygamous union such as a customary marriage or a monogamous union such as marriage under the Act. Special provisions for obtaining consent are inserted in the Marriage Act (Cap 115)"[1]

On appeal to the Supreme Court, the decision of the High Court that the customary marriage was not valid since the bride's consent had not been given, was confirmed. It was held that the decision of the learned trial Judge, so far as it related to consent, was more consistent with the principles of natural justice, equity and good conscience.

These decisions demonstrate that, at least in legal theory, the modern girl who is being forced to marry against her wishes is in a better position than was her counterpart in traditional society. If she has the moral courage to do so, she may flout parental authority, safe in the knowledge that the law will, in the ultimate, uphold her right of free choice of a marriage partner.

Whitfield[2] has suggested that in South Africa, a girl who was forced in marriage against her will had a right of appeal to the chief "who often ordered or persuaded her guardian to abandon his project". Simons, however, has shown that this view is based on surmise, and he

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1. Ibid., p.530; No special provisions for obtaining the consent of the parties to a marriage is inserted in the Marriage Act (Cap 115) as declared by the learned Judge - see Agu v. Agu Suit No. E/5D/70 and, below, Chapter X. A marriage contracted under the Marriage Act is valid, even if the parties or one of them had not consented: see S.33; but now see the Matrimonial Causes Decree, 1970, s.3(1)(d).
2. G.M.B. Whitfield, South African Native Law, 2nd. edit. (Johnnesburgh, Cape Juta,1948), p.87.

submits that a girl was "legally obliged in the last resort to submit if her people overruled her objections".[1] In the South African case of Nomatusi v. Nompetu,[2] the court recognized the fact that custom allowed a father to use force and often violence to coerce a reluctant daughter into accepting a bridegroom whom she did not desire, but rejected such treatment as "repugnant to, and in conflict with, all principles of law and humanity".[3]

Evidence collected from very old people during field-work in the various communities, supported the submission of Simons. A few interviewees suggested that a girl had the right to refuse the choice of a despotic father. When further asked what the girl would do if her father remained obdurate, they admitted that in such circumstances the girl would have to submit. There was no right of appeal as such to the chief or elders of the village.[4]

The modern Nigerian girl who refuses to submit to parental pressures may resort to the law for protection. Section 361 of the Criminal Code may be utilized, and if

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1. H.J. Simons, African Women: Their Legal Status in South Africa, op.cit., p.103.
2. [1915] 3 N.A.C. 165.
3. Ibid.,p.166; cf. Ared Asham v. Njokk Abang, cited by Talbot, In the Shadow of the Bush, op.cit., p.111, where the Customary Court held that a girl on attaining marriageable age, could confirm her childhood marriage, or repudiate it if she wished. To protect women against abuses of patriarchal authority, The Natal and Cape administration introduced legislation prohibiting forced marriages; see s.29, Cape Proclamation 140, of 1885; s.59(1) Natal Code of Native Law, which requires a public declaration by the bride of her free consent; see also Simons, op.cit.,p.104; Phillips, op.cit., pp.203-205; Seymour M. Seymour, Native Law in South Africa, 2nd edit. (Juta: Capetown, 1960), pp.73-76.
4. Cf. the position among the Fante where, if the consent of a woman's family is withheld, a valid marriage may be contracted, provided the agreement is made in the presence of "creditable and responsible witnesses, or in the presence of the chief or headman of the place, see J.M. Sarbah, Fanti Customary Laws, op.cit., p.48.

her parents persist in their choice of bridegroom, and effect a marriage despite her protests, the marriage will not be enforced by the courts.

The modern woman is in a more fortunate position than the woman in traditional society as far as the law regarding her consent to marriage is concerned, but in actual fact she may be in no better position to resist parental pressures. Read notes that "in the villages of Africa the day has not yet come when young daughters will readily invoke the aid of local judicial authorities to defy their parents' wishes", and this is very true of the ordinary Nigerian village girl. Not many girls have the courage of Veronica, the heroine of Ogali's play, "Veronica My Daughter", who, in answer to her father's threat to flog her if she does not give up Michael, the man of her choice, and marry the man he has chosen for her instead, replies:

> "Papa, I must be candid now, I love Mike and I think nothing on earth can separate us. If you flog me I must love him. If you curse me, I must love him. If you cut off my head...well, I must still love him in the world beyond. I know your opinion. You want me to marry the old illiterate man, Chief Bassey - No! The more I see him, the more I am offended. In fact the mere sight of him is annoying; but the more I see Mike, the more I love him. I have decided to marry Mike and I assure you we are wedding in a few months time, that is a month after the examination. If you give your hand to it - all good. If you do not, I assure you before God and Man that nothing stops it".[1]

There are a few cases, some of them recorded in the Social Welfare Departments of the various States which show that forced marriages in Nigeria, although being slowly weeded out, are not yet extinct. There are cases where judges have refused to declare such marriages void. Although the marriage in Agu v. Agu[2] was a statutory marriage, it illustrates the difficulty a woman may face

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1. Ogali A. Ogali, "Veronica Makes Up Her Own Mind", in Onitsha Market Literature edit. by Emmanuel Obiechina, (London: Heineman, 1972), p.49.

2. [1970] Suit No. E/5D/70, unreported, Enugu High Court.

in attempting to prove that a marriage was contracted without her consent. The petitioner in this case sued for a declaration that her marriage was void ab initio, based on the fact that at the time the marriage took place she was only fourteen years of age, that she did not consent to the marriage, that she was crying during the ceremony, and did not understand the nature of the ceremony. Phil-Ebosie, J., rejected her evidence that she was only fourteen at the time of the marriage as mere hearsay. He held that there was no provision in the Marriage Act that the consent of the bride was a legal essential of the marriage. Despite the fact that attempts at reconciliation had been made by several prominent persons but the petitioner was adamant that she would never live with the respondent again, the Judge refused to declare the marriage void or to grant the wife a divorce. He expressed the hope that "reason may one day prevail on the petitioner to return to her husband's house".

4. Summary and Conclusion

A. Summary

The consent of the bride's parents, usually her father, or other legal guardian, and in some communities, also her mother's consent, is a legal essential of a valid customary marriage which involves payment of dowry, in traditional societies. Where parents refuse to give their consents, there was little the bride could legally do to compel them to do so. Among the Yorubas the practice of cohabiting without parental consent, where parents refused to give their consents eventually led to this type of union being regarded as a valid customary marriage.[1]

The requirement of parental consent for a woman's marriage has been retained to a large extent in the customary laws of most contemporary societies, although certain

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1. See Bascom, The Yoruba of Southwestern Nigeria, op.cit., p.59; Johnson, History of the Yorubas, op.cit., p.116.

inroads in the principle have been made among a few communities by legislation.[1] In other communities, the bride cannot force her parents to give their consent, and consequently she cannot contract a valid customary marriage. If the bride is twenty-one years or older she may contract a statutory marriage without the consent of her parents. This is not a popular alternative especially among the Igbos and it has proved unsuccessful in a few cases.

The bride's consent was a legal essential of a valid customary marriage in many traditional communities.[2] Child-betrothal and child-marriage, however, were prevalent in most societies, and these were naturally conducive to forced marriage, since invariably the bride was too young to appreciate the true nature of the marriage contract. In some societies, the bride was given an opportunity of rejecting or confirming the marriage contracted on her behalf, before cohabitation with the husband. Many societies, however, regarded her consent given when she was a child as legally binding, and no opportunity for rejection was given to the bride before she was handed over to her husband. Where she was handed over as a child to the husband, it was even more difficult for her to repudiate the man chosen for her.

Child-betrothal and child marriage are relatively fewer in modern societies, but they are by no means extinct.[3] There is evidence of some girls who were married as children being forced to live with their husbands, who

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1. See e.g. Marriage, Divorce and Custody of Children Adoptive Bye-Laws, 1958, W.R.L.N. 456 of 1958, s.5.
2. But see Nwogugu, Family Law in Nigeria, op.cit., p.44; Obi, Modern Family Law, op.cit., p.164.
3. See Esenwa, op.cit., p. 72; Obi, Modern Family Law, op.cit., p.166; Talbot, Tribes of the Niger Delta, op.cit., p.184.

invariably are much older than they are.[1]

The consent of a grown-up bride was necessary for a valid marriage in traditional customary law. Girls, however, usually accepted their parents' choice, and cases of conflict were relatively few. Where a girl refused to marry a man chosen for her by her parents, she may be persuaded by moral arguments, threats or physical force. Modern girls show an increasing tendency to oppose parental choice if they do not like the men chosen for them. Many parents seem to recognize this fact, and do not generally force their daughters to marry against their wishes, although they may use gentle persuasion. If a marriage is contracted without the birde's consent, the courts will invariably declare it void, and criminal action may be taken against persons including parents, who detain or take away a girl with a view to marriage, without the girl's consent.[2]

Should parental consent for a customary marriage no longer be required after age eighteen? It should not be forgotten that the Nigerian system of social services is not yet as fully developed as it is in England. A woman who has been left destitute by her husband is invariably forced to seek support from her relatives, since the aid she can obtain from the Social Welfare Departments may be less than adequate for her needs. Her family may refuse to help her if she had asserted her independence and married without their consent. Extreme youth is more prone to make hasty sentimental decisions which may later be regretted.

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1. See in this respect the answer given by the Governor of Nigeria to the Secretary of State for the Colonies, in 1937: "In all cases in which pressure is being brought to bear upon a girl to marry against her will, she is at liberty to complain to the Native Authorities or to the District Officer; and this right is freely exercised. When such a complaint is received the families concerned are called together and attempt is made to settle the matter amicably. Failing this, proceedings for termination of the contract are instituted in the Native Court - see Correspondence Relating to the Welfare of Women in Tropical Africa, 1935-37, CMD. 5784, 1938, pp.32-33.

2. See Nwogugu, Family Law in Nigeria, op.cit., p.44; Obi Modern Family Law, op.cit., p.164.

CHAPTER VI

FORMATION OF MARRIAGE (11)

A. Dowry ("Marriage Consideration")

> "It is frequently said that, today, fathers do not give their daughters in marriage; they sell them to the highest bidder. The social state of women is deteriorating".
>
> The Minister of Welfare - Eastern House of Assembly.[1]

1. Introduction

Various terms have been used by writers to describe the property transferred on the occasion of a customary marriage, for example, "marriage consideration", "bride-price", "dowry", "token payments", and "gifts" have all been used to designate the payments made by the bridegroom or his kin to the bride or her family.[2]

Some writers use the local term for such payments, the most widely known being lobola, the South African word for these payments.[3] The use of the word lobola has been extended by various writers to describe these payments in the whole of Southern Africa, but there seems little justification for the use of the word lobola to refer to these payments in Nigeria,[4] since it is entirely unknown to the average Nigerian. There are local terms used for

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1. Second Reading of the Bill on The Limitation of Dowry Law, Debates in the Eastern House of Assembly, 28 March, 1956, Eastern Region of Nigeria, Parliamentary Debates, 1956, Vol.II, p.674.
2. See generally, Jack Goody and S.J. Tambiah, Bridewealth and Dowry, (London: Cambridge University Press), 1973, pp.1-2; E. Torday, "Brideprice, Dower or Settlement", Man. Jan. 1929, pp.5-7.
3. See Simons, African Women: Their Legal Status in South Africa, op.cit.,p.87, "lobola is a Zulu noun which describes a man's obligation to pay cattle, horses, hoes, money or other property to the father of his intended bride in consideration of their marriage".
4. See e.g. Okonjo, The Impact of Urbanization on the Ibo Family Structure, op.cit., p.151, who uses lobola to designate dowry among the Igbos.

these payments by various communities in Nigeria. For example, among the Yorubas, the payments are referred to variously as "ano", "ana", and "idana"; among the Igbos as "onyenye", "ego nwanyi" (woman wealth) and "ikwu-ngo" (earnest price); while among the Ibibios they are known as "mpko ndu" (the thing which a man gives when he marries a woman).

The terms commonly used to refer to these payments in Nigeria generally are "bride-price" and "dowry". The Bride-Price Committee set up by the former Eastern Region of Nigeria to investigate the effects of rising bride-price in the various communities of the Region and to make recommendations, reported that many complaints were received against the use of "the objectionable and derogatory term "bride-price".[1]

"Dowry" as used in European society refers to property or money brought by the bride to her husband on the occasion of their marriage, but in Nigeria, it is used to describe the payments made to the bride and her family by or on behalf of the bridegroom. The term "dowry" is widely used by Nigerian courts[2] and legislatures,[3] and for these reasons will be used throughout this thesis to refer to the payments made in cash or in kind, or by services rendered, by or on behalf of the bridegroom to the family of the bride, as a legal requirement of a marriage, and which are invariably refundable when there is a divorce. Property transferred on the occasion of a marriage from one party to another, which are merely paraphernal in character, and which are not essential to the legal validity of the marriage will be referred to as "gifts".

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1. See Bride Price Committee Report, 1954, p.3.
2. See Briggs v. Osagie [1964] M.N.L.R.95; Chawere v. Aihenu and Johnson [1935] 12 N.L.R. 4.
3. See e.g. The Limitation of Dowry Law, 1956, Cap 76, Laws of Eastern Nigeria, 1963; Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958, W.R.L.N. 456 of 1958; The Daura Local Authority (Declaration of Daura Native Marriage Law and Custom) Order, 1972.

Marriage by payment of dowry, for want of a better name will be described herein as "marriage by consideration".

2. Definition of Dowry

The Limitation of Dowry Law, 1956, of the former Eastern Region of Nigeria, defines dowry as:

> "...any gift or payment, in money, natural produce, brass rods, cowries or in any other kind of property whatsoever, to a parent or guardian of a female person on account of a marriage of that person which is intended or has taken place.
>
> 'Incidental expenses of marriage' means customary gifts or payments, other than dowry, made or incurred on account of a marriage, before, at the time of, or after that marriage".[1]

This definition makes a distinction, which is also maintained by the courts, between dowry, properly so-called, that is, a legal requisite for a customary marriage, and incidental expenses, which are not legal requirements, but which are nevertheless customary in the various societies. The distinction is important, especially in respect of refund of dowry, since incidental expenses are usually not refundable in the case of a divorce, whereas dowry nearly always is. For example, in Okaludo v. Omama,[2] the appellant claimed a refund of £60 allegedly paid by him as dowry on the occasion of his marriage. The evidence showed that the actual dowry paid was only £22, and that the remaining sums were for incidental expenses. The Customary Court ordered the respondent to refund £10 of the £22 dowry to the appellant, but dismissed his other claims. This decision was upheld on appeal to the High Court, on the ground inter alia that expenses for clothing etc. do not form part of the dowry, and are not refundable.

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1. S.2, Limitation of Dowry Law, Cap 76, Laws of Eastern Nigeria, 1963 Revision.

2. [1960] W.R.N.L.R. 149.

Similarly, in Okoriko v. Otobo,[1] where the plaintiff claimed £140 dowry refund on the dissolution of his marriage, it was held that apart from the sums of £15 called "Extra Dowry" and £60 called "Grand Dowry", most of the various sums claimed by the plaintiff were not part of the dowry, but were presents made to the wife and some members of her family, and these could not be reclaimed, as property in them had passed to the donees. They were outright gifts, and as such were irrecoverable in law. The court also held that, despite the epithets used, the sums of £15 and £60, called "Extra" and "Grand" dowry respectively, were in fact presents to the bride's family, and refund of these gifts could not be legally enforced, since any customary law which gave a right to reclaim such gifts or presents were contrary to the provisions of section 19 of the Customary Courts Law, 1958.[2]

Can dowry be legally described as a gift? The Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958, defines dowry as "a customary gift made by a husband to or in respect of a woman at or before marriage".[3] Criticizing this definition Obi says:

> "...a dowry is not necessarily a gift. Its payment is enforceable in a court of law".[4]

It is respectfully submitted that this reason for dowry not being a gift cannot be supported. A gift legally means voluntary transference of property without consideration. There are, however, contrary to Obi's assertion, voluntary transfers of property without consideration, which are legally enforceable. For example, property bestowed in a deed, without consideration, is enforceable in a court of law, although it is a gift.

Nsereko[5] on the other hand, asserts that dowry is

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1. [1962] W.R.N.L.R. 48.
2. Cap. 31, Laws of Western Region of Nigeria, 1958 Revision.
3. W.R.L.N. 456 of 1958.
4. Obi, Modern Family Law, op.cit., p.175.
5. D.D. Nsereko, "The Nature and Function of Marriage-Gifts in a Customary African Marriage", East African Law Review, Vol.6, No.2, pp.89-112 at p.90.

not a gift, because, "in a great many instances the giving of marriage gifts was not and still is not 'voluntary' on the part of the prospective bridegroom. To the contrary, he must deliver or promise to deliver the gifts if the resultant marriage contract is to come into force unless, of course, he has been excused". This submission also cannot be supported. Transference of dowry is voluntary in the sense that marriage, although desirable, is not compulsory, and no one is forced to marry against his wishes. When a man therefore pays a dowry in order to get married, it is a voluntary payment, since he has the alternative choice of remaining unmarried.

The submission of these two writers that dowry is not a gift is supportable on the ground that the transference is made for valuable consideration, namely, the conjugal and other services rendered, or to be rendered, by the wife.[1] Dowry therefore cannot be legally classified as gifts. Traditionally, dowry usually took the form of labour services, and in some parts of Nigeria,[2] still does. In such cases the services of the man are given in exchange for the services of the woman, both being valuable consideration. These services cannot be properly described as gifts.

3. The Legal Functions of "Dowry"

A. Introduction

The sociological significance of dowry in African customary marriage has received considerable attention from anthropologists and missionaries. The various reasons given for the payment of dowry, as well as the diverse opinions as to its effect on the marital relationship, reveal two facts:

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1. See In Re Sapara [1911] Renner's Gold Coast Reports, 605; "the consideration is on one side the giving of the ano [dowry] and the other the giving of the bride".
2. See e.g. the peoples of the middle Niger where the usual length of service for a bride is from two to six years, see Harold Gunn and E.R. Conant, Peoples of the Middle Niger Region, Northern Nigeria, (London: International African Institute, 1960), pp.43-44.

(a) the nature and function of dowry differ widely among different societies, and no single description can adequately characterize dowry in all the various African societies where dowry is payable;

(b) institutions never subserve one single purpose, but rather combine a number of social purposes in their structure.[1]

On one hand, all the virtues found in marriage in traditional society, have been attributed to the payment of dowry by its protagonists. Among these virtues may be briefly mentioned the following:

(1) it ensures the stability of the marriage by discouraging divorce.[2]

(11) it protects the virtue of young girls and the morality of the society.[3]

(111) it ensures good care and considerate treatment of the wife by her husband.[4]

(IV) it ensures to a man legitimate children.[5]

These, and other virtues, are summed up by Lindley who wrote strongly in favour of payment of dowry in South Africa:

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1. See Nadel, A Black Byzantium, op.cit., p.352.
2. See e.g. Bascom, The Yoruba of Southwestern Nigeria, 1969, op.cit.,p.60; Lugard, Political Memoranda, 1906, op.cit., p.230; Meek, Law and Authority, op.cit.,p.267; Mullin, The Catholic Church in Modern Africa, op.cit., p.153; Diamond, Primitive Law, op.cit., p.230.
3. Diamond, Primitive Law, op.cit.,p.230; Kennan Nair, Politics and Society in Old Calabar, op.cit.,p.63.
4. See Diamond, Primitive Law, op.cit.,p.230; The husband "often prizes less what he does not pay for; Nair, op.cit.,p.63.
5. Radcliffe-Brown, Structure and Function in Primitive Society, 1952, op.cit.,p.30; "One of the chief functions of lobola is to fix the social position of the children of a marriage; see also Jeffreys, "Lobola is Child-Price," op.cit.,pp.145-184; Nair, Politics and Society in Old Calabar, op.cit.,p.63; Uka, Growing Up in Nigerian Culture, op.cit., p.16.

> "Why is it that I have not heard of six illegitimate children since I came among this people? Why is it that wives are required to be true and faithful to their husbands? Why is it that wives are not daily driven off and new ones taken? Every year more husbands are separated by the law of Connecticut than I have heard of here in 33 years, ...Why is it that we have not here such a Sodom as once existed in the Sandwich Islands? Why is it that the family organization here is as perfect as it could be made with the existence of polygamy? There is seldom a dispute among children about the division of a man's property, however many wives he may have had.
>
> Uku-lobola lies at the foundation of the structure of native society here and has been productive of a world of good".[1]

These sentiments would be readily accepted by many of the older inhabitants in Nigeria as equally applicable to traditional Nigerian society.[2] A few moments reflection exposes the fallacy of the argument that payment of dowry is a panacea for marital ills. Dowry continues to be paid in modern Nigerian societies, and is generally regarded as indispensable by many communities. In spite of this, the evils which dowry is alleged to abolish nevertheless flourish.

On the other hand, all the inequities of the male-dominated traditional society are attributed to the payment of dowry. Judges, as seen earlier,[3] have referred to the system in derogatory terms, tending to show the contempt with which the system is regarded. Thus payment of dowry is said to:

(1) encourage prostitution, since it reduces the opportunities of young girls to marry.

(11) reduce women to the level of chattels to be bought and sold.

(111) help men to claim the legal paternity of children which are not biologically theirs.

(IV) prevent women from leaving undesirable husbands.

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1. Edwin W. Smith, The Life and Times of Daniel Lindley, 1801-80, Missionary to the Zulus, Pastor of the Voortrekkers, Ubebe, Omhlohe (London, 1949), pp.393-394.
2. Lugard, Political Memoranda, 1906, op.cit., p.230.
3. See further Chapter III, pp.202-205.

Similarly, the system does not merit all the calumny heaped on it. Many of the evils associated with modern marriage would exist even if payment of dowry was abolished.

There are three main legal functions generally attributed to the payment of dowry in customary marriage:

1. it is an essential to the legal validity of a marriage;
2. in the majority of societies, it ensures to the husband legal paternity of all children born to his wife;
3. a refund of dowry, or part thereof, paid on the occasion of the marriage is necessary to effect the dissolution of the marriage by divorce, or death of the husband.

The second and third functions will be discussed in the next two following chapters respectively.

B. Dowry as a legal essential of customary marriage

It has been stated previously, that the overwhelming majority of Nigerians contract a customary marriage by payment of dowry.[1] To what extent is the payment of dowry essential to the legal validity of such marriages?

(1) Traditional society:

In 1954, the former Eastern Region of Nigeria set up a Bride-Price Committee to investigate the social effects of the payment of dowry in the Region and to make recommendations as it might think fit, with a view to the removal of any anomaly or hardship. In the course of their investigations the Committee took advantage of this opportunity to obtain descriptions of the marriage systems in their traditional form in the various communities, since they correctly felt that unless the traditional form of marriage is compared with conditions in the present era the social effects which they were asked to investigate could not be properly assessed.[2]

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1. See above, Chapter II, Table 2:1, p.175.
2. Bride Price Committee Report, op.cit., p.3.

In the report subsequently submitted to the Government, they stated the traditional position with reference to payment of dowry as a legal essential of a marriage as follows:

> "22. During the period of betrothal which usually lasted several years the young man rendered labour services to the girl's parents. These took the form of assistance in farm work, particularly with the original clearing of the bush and the making of yam heaps, of assistance in the building of their house and sometimes palm cutting and fence-making also. During this period he usually gave presents to the girl's parents of things like palm wine, yams and firewood or, if he was a hunter, a share of any animal he killed. It was generally obligatory to give certain presents at festival times. In this way the parents were compensated for their trouble in bringing up their daughter and for the loss of her services on the farm when she married. In some areas the parents received in addition livestock such as cows or goats or a special gift of yams as an additional recompense. This was the origin of the dowry. It was never fixed. The number of years during which labour services were rendered varied with the age of the girl when the marriage was first agreed upon and where cows and goats were also given their number varied with the wealth of the young man and his family. When the girl went permanently to live with the young man there was usually some ceremony to mark the occasion and a feast, (sometimes more than one) would be given. The payment of dowry was not the essential element of the marriage contract. It was the giving of consent, ratified by the acceptance of drink that was really important and generally the marriage ceremony, often sacrificial in nature, was also essential.[1]

In view of the fact that the Bride-Price Committee defined "dowry" as "those things whether cash, gifts, in kind or labour services which a man gives when he marries a woman and which are regarded in a case of divorce as refundable", the Committee's statement that the payment of dowry was not the essential element of the marriage contract insofar as it implies that a marriage was valid without such payment cannot be supported.

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1. Ibid., p.4.

There is abundant evidence which shows that in the traditional society, not only those communities visited by the Committee, but among most other Nigerian communities, farm and other labour services were rendered by the bridegroom, invariably assisted by his age-mates, to the parents of the bride, over a period of time.[1] As stated by the Bride-Price Committee, these services were always supplemented by payments in kind, such as yams, cocoanuts, corn or other farm products or meat given at certain specific periods, or at certain festive seasons to the parents of the prospective bride, especially the mother. Although the length of the services, and amount of the gifts were not fixed, nevertheless, they were an important part of the marriage contract, and if they were not performed or given, would entitle the bride's parents to break off the engagement.[2]

Equiano, an Igbo, captured in Nigeria when he was a youth and taken to England as a slave in the early eighteenth century, whose autobiography remains one of the earliest accounts written about the Igbos by one of their own members, mentions that at the time of the marriage, "the parents of the bridegroom present gifts to those of the bride, whose property she is looked upon before marriage; but after it she is esteemed the sole property of her husband".[3] These gifts compensate for the loss of the bride and her progeny, and were considered important in most communities.

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1. See generally, Bradbury and Lloyd, The Benin Kingdom, op.cit.,pp.80, 108, 157; Forde, The Yoruba-Speaking Peoples, op.cit.,p.28; Ford et.al, The Peoples of the Niger Benue Confluence, op.cit.,p.68; Forde and Jones, The Ibo and Ibibio-Speaking Peoples, op.cit.,p.77; Fadipe, op.cit.,pp.73-78; Meek, Northern Tribes of Nigeria, op.cit.,p.201; Gordon, Bishop Shanahan, op.cit., p.220; Gunn and Conant, Peoples of the Middle Niger, op.cit.,p.43; Uka, op.cit.,pp.16-17; Kasunmu and Salacuse, op.cit.,p.78.

2. See Herbert Spencer, Principles of Sociology (London: 1882-96), Vol.I, p.721, who opines: "obtaining of wives by services rendered instead of by property paid, constitute a higher form of marriage, and is developed along with the industrial type of society".

3. Equiano, Equiano's Travels, op.cit., p.3.

Fadipe notes that among the Yorubas, in order to secure maximum services from his son-in-law, a father shared the tasks among them instead of requiring them to labour on the same piece of work. One was asked to work on the farm, another to erect the mud walls of a new house, while another was responsible for the thatching, and yet another for the roof timber, and so on.[1]

In many societies, for example the Igbos, cows, goats and other animals were also given as dowry, in addition to the services, and a small amount of the current currency, which may be manillas, brass, rods or cowries. Money was not important, however, and the services rendered by the prospective bridegroom were of more value and importance than the small sums paid.[2]

It is submitted that payment of dowry, whether in the form of services, farm produce, cattle, or other medium of exchange was always essential to the legal validity of a marriage in traditional society. As shall be seen later, the payment of dowry determines the legal paternity of the children borne by the wife, and the refund of dowry is essential to a divorce.

(11) Modern society:

The position has not changed in the modern society. Payment of dowry is a legal essential of a valid marriage under customary law[3]. There are a few

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1. Fadipe, Sociology of the Yoruba, op.cit., p.77.
2. See Bride Price Committee Report, op.cit., p.42.
3. See e.g. Begho, Law and Culture in the Nigerian and Roman World, op.cit.,pp.31-32; A.N. Aniagolu, "Aspects of Customary Marriage and Divorce and their Incidents upon Family Life", on African Indigenous Laws, edit. by T.O. Elias et.al; (Enugu: Nigeria, Government Printer, 1975), pp.101-103; Stanley Childs, "Christian Marriage in Nigeria", 16 Africa, 1946,pp.238-246 at p.243; Phoebe Ottenberg, "The Afikpo Ibo of Eastern Nigeria" in Peoples of Africa edit. by James L. Gibbs, (New York: Holt, Rinehart and Winston Inc., 1965), p.20.

exceptions, for example, a "marriage by mutual consent only" found among the Yorubas, but the general rule among most communities is that the payment of dowry is an indispensable legal essential of a valid marriage, except where such payment has been specifically waived by the bride's parents.[1]

With the advent of money and increased material wealth, services and the value they represent assumed greater importance, since money could be paid instead of actual services. In process of time, money payments entirely replaced services among some communities, although in other communities, especially where farming was the main occupation, the services of the bridegroom have remained an important aspect of the marriage contract. For example, among the Ibibios, the services rendered by the bridegroom to his in-laws are considered a more important part of the dowry than the relatively small amount of cash payable.

The position with reference to payment of dowry as an essential of a valid customary marriage has been correctly stated by Radcliffe-Brown as follows:

> "In most African marriages, as in the early English marriage, the making of a payment of goods or services by the bridegroom, to the bride's kin, is an essential part of the establishment of 'legality'".[2]

The requirement of dowry as a legal essential of a valid customary marriage has been established in several cases. In 1911, Osborne, C.J., in the case of In Re Sapara[3]

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1. See Emeakuana and Anor. v. Ume Ojiako [1976] Suit No. AA/1A/76, unreported, Amawbia/Awka High Court where it was held that dowry as a legal essential of a customary marriage is firmly established as to require no further proof in court; see further, Bohannan, Justice and Judgment among the Tiv, op.cit.,p.75; Mullin, The Catholic Church in Modern Africa, op.cit.,p.153; Uchendu, The Igbo of South-east Nigeria, op.cit.,p.50; Talbot, Tribes of the Niger Delta, op.cit., p.190.

2. Radcliffe-Brown, Introduction, in African Systems of Kinship and Marriage, edit. by Radcliffe-Brown and Forde, op.cit., p.46; see also Uchendu, "Concubinage Among Ngwa Igbo," op.cit., p.188; Kasunmu and Salacuse, op.cit., p.79; Meek, Northern Tribes of Nigeria, op.cit., p.201; Meek, A Sudanese Kingdom, op.cit., p.373; cf. the position in Kenya, - see Eugene Cotran, "The Laws of Marriage and Divorce in Kenya", in Integration of Customary and Modern Legal Systems in Africa, op.cit., p.418: With the exception of three tribes customary

footnotes 2 and 3 continued.....

observed:

> "The actual legal essentials of native marriage are as laid down in Savage v. Macfoy, viz., first, the consent of the girl and her family, and secondly the presentation and acceptance of the ano [dowry] ...the consideration is on one side the giving of the ano, and on the other the giving of the bride. Despite the social changes wrought by the increase of individual wealth, and the consequent loosening of the family tie, and by the spread of Christianity and Mohammedanism, the giving of the ano has always remained a feature of the native marriage ceremony, whatever the religion or the position of the parties".[1]

It should be noted that the learned Judge was here speaking of a marriage arranged by the family of the two spouses, the usual form of marriage among the Yorubas.

This principle of customary law enunciated by Osborne, C.J., in the above passage has not changed with time. In the recent case of Egri v. Uperi,[2] it was held that before a marriage could be established, "the bride-price must be fixed", and in Ogunremi v. Ogunremi,[3] the idana (dowry) ceremony was held to be a sine qua non of a valid marriage according to Ado-Ekiti [Yoruba] customary law. In Okpanum v. Okpanum,[4] Agbakoba, J., stated that the "most important evidential requirement constituting a valid customary marriage is the payment, or part payment of bride price or dowry".[5] The learned Judge made a distinction between evidential and essential requirements. He said:

> In order to constitute a valid customary marriage, therefore, it is necessary to establish the existence of the essential requirement and one or more of the evidential requirements. It follows that parental consent, and in recent years mutual agreement of the

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Footnotes 2 and 3 continued....

2...marriage in Kenya is preceded, accompanied or followed by a payment or payments by the bridegroom or his family to the bride's family". See also Abrahams, The Peoples of Greater Unyamzi, op.cit., p.44.

3. [1911] Renner's Gold Coast Reports 605.

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1. Ibid., 608.
2. [1974] N.M.L.R. 22.
3. [1971] 4 U.I.L.R. 466.
4. [1972] 2 E.C.S.L.R. 561.
5. Ibid.,p.563.

> man and woman, coupled with payment of dowry or part thereof or coupled with one or more ceremonies associated with marriages and recognized as such by the community would constitute a valid customary marriage".[1]

From this statement, it appears that in the opinion of the learned Judge, marriage ceremonies can be an alternative to the payment of dowry. This is the introduction of a revolutionary principle into modern Igbo customary law of marriage, and is not supported by other decided cases, academic writers, or by actual practice of the people. The Customary Law Manual of the Igbos, 1977, states:

> "305.(1) Bride-price is an essential requirement for marriage. Agreement on it is a condition precedent for contracting a valid marriage; and so, no marriage can take place unless and until bride-price is fixed and agreed upon.
>
> (2) It is not essential that the agreed bride-price shall be paid in full, but at least part-payment of the bride-price must be made before a valid marriage can be performed".[2]

Except for the fact that payment of dowry may be waived by the bride's parents, which is very rare, the statement in the Customary Law Manual is in accordance with the law and practice of the Igbos. During field-work, it was emphasized repeatedly by informants that there can be no valid marriage without payment of dowry. Parents who do not wish to give the impression that they are selling their daughters, nevertheless insist on the payment of a token sum, since they are aware that without such payment, the marriage would not be regarded as valid.[3]

The present writer examined the registration of more than a thousand customary marriages at Onitsha Local Government Office. In all the cases, the amount of dowry

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1. Ibid., p.564.
2. Customary Law Manual, op.cit., p.238.
3. Cf. Ellis, The Yoruba-Speaking Peoples, op.cit.,p.182; "The poorest always pay a small sum for their wives, so as to give the union the title of a marriage, and distinguish it from concubinage".

paid, or agreed to be paid, was precisely stated. In not one of the cases registered was there any indication that payment of dowry had been waived.

In view of the above evidence, contrary to the opinion of Agbakoba, J's statement in Okpanum v. Okpanum,[1] it is submitted that payment of dowry is an essential of a valid marriage in modern Igbo society. The consensus of opinion is that in all marriages in which dowry is payable, payment in part or in whole, or agreement to pay is legally necessary for the validity of the marriage, unless such payment is waived.[2]

C. Quantum of Dowry

(1) Traditional society

As previously stated,[3] payment of dowry in traditional society consisted mainly of services performed by the prospective bridegroom for the bride's parents, accompanied by payments, such as farm produce, meat, cows, goats and other forms of property, including, in some cases, small amounts of money current at the time in the particular society. The quantum of dowry varied from society to society. The services rendered by the bridegroom usually depended on the duration of the betrothal period before the bride was formally taken to her husband's house. If the girl was betrothed as a child, the periods of service would extend over many years. The services usually commenced after the betrothal and lasted for the duration of the marriage. This has given rise to the statement that the payment of dowry never ends.

The quantum of other forms of property included in the dowry varied from society to society and may briefly

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1. [1972] 2 E.C.S.L.R. 561.
2. See Obi, Modern Family Law, op.cit., p.175; Kasunmu and Salacuse, op.cit.,p.77; Nwogugu, Family Law in Nigeria, op.cit.,p.49;Aniagolu, op.cit.,p.101.
3. See above, p.459.

be described among the Yorubas, Igbos and other communities.

(a) Among the Yorubas

Bascom records that in the traditional society, during the engagement, and continuing as long as the marriage lasted, the suitor had to perform 'free labor' when called upon by his father-in-law to do so.[1] This involved clearing the farm, hoeing yam heaps, building the walls of a house, roofing the house, or providing the rafters or thatch. Each year during the betrothal, the suitor had to send a total of twenty-four yams and some maize to his fiance's mother during four of the religious festivals. In addition, he had to send the girl's father an annual gift of one log of firewood from the ita tree. Negligence in any of the obligations to the fiance's family could lead to arguments, and even to the breaking of the engagement.[2]

When the marriage is first proposed, the intermediary takes forty kola nuts and ten shillings to the girl's father. The second instalment consisted of cowry shells equivalent to two shillings six pence given at any time before the third year after puberty when the girl becomes "marriageable". The final instalment made just before the girl is taken to her husband's house was about two shillings, six pence in cowrie equivalent.[3]

The dowry among the Yorubas generally, therefore, consisted of labour services, usually performed with the help of the prospective bridegroom's relatives and members of his egbé (age-group), farm-produce, and cowrie shells, amounting in value to about fifteen shillings to £1. Fadipe notes that the obligation to provide farm produce was not difficult to fulfil, and generally, the total dowry and other gifts were within the reach of most men by the time

1. Bascom, The Yoruba of South-western Nigeria, op.cit.,p.61.
2. See Ajisafe, op.cit.,p. 83; Fadipe, op.cit., pp.73-78.
3. Bascom, op.cit.,pp.61-62; Forde, The Yoruba-Speaking Peoples, op.cit.,p.28; Elias, Nigerian Legal System, op.cit., p.291-292.

they reached marriageable age.[1]

(b) Among the Igbos

There is considerable variations among Igbo communities, and in some communities, the nature of the dowry in traditional society is similar to that described above for the Yorubas. For example, among the Igbos of Asaba District, Thomas reports:

> Bride price - A girl is often asked for in marriage the day after she is born, the suitor bringing wood and throwing it down before the mother's door. Some months may elapse before he is finally accepted, but as soon as he is recognised and presented to the umunna (sept, or extended family) he is called upon (a) to work on his prospective father-in-law's farm or elsewhere if he needs assistance in clearing the land, planting yams, re-roofing the house and so on, and (b) to bring "ifenru", gifts of yams, palm wine, cowries, palm oil, etc., on certain ceremonial occasions; he will also give 15 or 20 yams to his mother-in-law once or twice a year besides bringing her palm nuts, wood, etc., and providing for her in his farm a plot in which she plants if'ubwo, vegetables, such as pepper, tomatoes, beans, etc., for him to tend.[2]

Similarly, in Onitsha, dowry was traditionally paid in labour services, and in presents given at festival seasons. Dowry for many of the older Onitsha women interviewed during field-work, consisted mainly of labour services, farm produce and meat, given at harvest time or other festive seasons. This was the general pattern throughout Igboland,[3] although there were a few communities, for example, Adaba in Nsukka Division, Orlu Division, and some communities in Okigwi Division, where dowry was traditionally paid in cows or goats, supplemented in some cases by farm labour.[4] In Adaba, the dowry usually consisted of three cows given to the bride's father, and yams

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1. Fadipe, op.cit.,p.74.
2. Thomas, Ibo-Speaking Peoples of Nigeria, op.cit., Part IV, p.61.
3. See Bride Price Committee Report, op.cit., Basden, Niger Ibos, op.cit., p.217.
4. Bride Price Committee Report,op.cit., pp.15-18.

presented to the mother.[1] In Orlu Division where dowry traditionally was paid in cows or goats, the number was never fixed, and varied according to the agreement of the parties. It usually ranged from one to two cows or three to eight goats. In Uturu community of Okigwe Division, dowry was traditionally paid in goats and varied from five to twelve.[2]

The general nature of dowry among the Igbos may be summed up as consisting mainly of labour services, farm produce, especially yams, and in some communities, cows or goats.[3]

(c) Among other communities

The nature of dowry in other traditional Nigerian societies does not differ radically from that which obtained among the Yorubas and Igbos. Among the Benins, Egharevba notes that as soon as the engagement ceremony has been performed, the bridegroom's expenses begin. He says:

> "From now onward to the end of his life, he is never allowed to forget the responsibilities he has taken on. Thenceforth he must send to the girl's parents annually seven yams in a bundle, one shilling in cash, and four pieces of kolanut, all this is called 'Agban' or 'Ikuangban'. The suitor is also expected to help his father-in-law with any house-building or farm work, as part of the dowry, so that he is very much tied to the girl's family, as well as to his wife".[4]

Among the Ibibios, apart from the labour services rendered, dowry was traditionally paid in goats, and ranged from ten to twenty-five in number in some communities, but the greatest importance is attached to the rendering of labour services and assistance, generally both before, and after marriage. After marriage the services continue, and

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1. Ibid., op.cit., p.15, par.97.
2. Ibid.,p.16, par.109.
3. See generally, Thomas, The Ibo-Speaking Peoples, op.cit., Part IV., pp.61, 64-85; Basden, Niger Ibos, op.cit., p.216; Talbot, Tribes of the Niger Delta, p.183 et.al., Meek, Law and Authority, op.cit.,p.273; Forde, Marriage and the Family Among the Yako, op.cit., p.16-19.
4. Egharevba, Benin Law and Custom, op.cit., p.16.

although they are not part of the refundable dowry, they are obligatory under customary law.[1]

The dowry among the peoples of the middle belt and Niger confluence consisted mainly of labour services on the farm, and sometimes lasted for five to six years, or even longer.[2]

The general position among all communities in traditional society may be summed up: dowry was mainly payable by services rendered by the prospective bridegroom. Provided a man was physically fit, there was no financial bar to the acquisition of a wife in most cases. The services were generally accompanied by small payments of kola, cocoanuts, yams, meat, corn or other farm produce the provision of which was not beyond the ability of the large majority of men.

(11) Modern society

It has been noted that the introduction of money affected the nature of dowry.[3] It also affected the quantity paid. In the traditional society money was not the important element of the dowry, although its inclusion was essential for the legal validity of marriage in some communities.[4] The value of the labour services rendered by the bridegroom, and the other forms of property given, far exceeded that of the money actually given. In most societies today, however, money has become the most important part of the dowry from the point of view of relative value, and in some areas of Igboland, the level of dowry a man is forced to pay in actual cash before he obtains a wife, is extremely high.[5] Recent world wide inflationary trends are reflected in the level of dowry

1. See generally, Bride Price Committee Report, op.cit., pp. 41-42, esp. par.277.
2. See Gunn and Conant, Peoples of the Middle Niger Region, op.cit.,pp.43, 53, 69 and 103; Harold D. Gunn, Pagan Peoples of the Central Area of Northern Nigeria,(London: International African Institute, 1956), pp.20, 46, 113.
3. See above, p. 461.
4. See Bride Price Committee Report, op.cit.,p.42 et.al.
5. For an account of similar escalation of dowry among

footnote 5 continued.....

asked for, and paid, in certain areas. Phillips observes that the rise in the levels of dowry may not in fact be exorbitant, in relation to the general erosion in monetary values.[1] Although this observation is generally true, the extent to which the amount of dowry payable has risen in certain areas provides some evidence to the contrary.

Before giving details of the level of dowry in some modern Nigerian communities, in an attempt to discover the extent to which the level of dowry has risen, it is necessary to mention the legislative and other attempts made by various governments and local communities to set maximum limits to the payment and refund of dowry.

4. Statutory Limitations of Dowry

A. Limitation of Dowry Law, 1956

The Limitation of Dowry Law, 1956,[2] applies in the Eastern States which formerly were included in the Eastern Region of Nigeria. As previously noted, the Government of the former Eastern Region set up a committee to investigate the social and other effects of the allegedly soaring price of dowry in the various communities of the Region. As a result of this committee's recommendations, The Limitation of Dowry Law was enacted. The Law fixes the value of dowry payable on the occasion of a marriage under Customary Law, at a maximum of £30, including incidental expenses. It is an offence punishable by up to six months imprisonment either to pay or to receive as dowry any amount in excess of the prescribed maximum.[3]

The courts are precluded from entertaining or from continuing any suit, or from making any decree or order, or executing any order if the amount of dowry involved in

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Footnote 5 continued..... South African Zulus, and Governmental attempts to curb it as early as 1869, see Theodore C. Binns, The Warrior People: Zulu Origins Customs and Witchcraft (London: Robert Hale & Co., 1975), p.194.

1. Phillips and Morris, Marriage Laws in Africa, op.cit., p.50.
2. Cap. 76, Laws of Eastern Nigeria, 1963 Revision.
3. Ibid., Section 4(1).

the claim is contrary to the Law.[1] In Okeke v. Okeke and Ors.[2] the Magistrate found as a fact that the first defendant had received the sum of £30 and three goats in respect of the marriage on which the suit was founded. He found that the defendant was not the person legally entitled to the payment of dowry and made an order for the £30 and three goats to be paid over to the plaintiff who was legally entitled to receive the dowry. On appeal to the High Court, the defendants argued that the order of the Magistrate was illegal being contrary to section 6 of the Limitation of Dowry Law, 1956 which provides:

> "(1) No court shall -
>
> (a) entertain or continue any suit or proceeding; or
>
> (b) pass any decree or order; or
>
> (c) execute wholly or partially any decree or order;
>
> if the claim involved in such a suit or proceeding or if the passing of the decree or order or if such execution would be in any way contrary to the provisions of this Law.
>
> (2) No court shall, in adjudicating any matter or executing any decree or order, recognise any marriage or promise or offer of marriage, which is avoided by this Law".

Egbuna, J., upheld the defendant's submission, but nevertheless changed the order of the Magistrate to read "thirty pounds". This decision seems to be contrary to the provision of the Law, although to hold otherwise in this particular case would have resulted in injustice to the plaintiff, since he was prevented by the Law from recovering the dowry wrongfully received by the defendants. In other words, a strict application of the Law would have enabled the defendant to profit from his own wrongful act.

The fact that the Limitation of Dowry Law is honoured more in the breach than in the observance is an open secret. At the Workshop on African Indigenous Laws held at Nsukka in 1974, the failure of the Law to curtail the rising level of dowry was acknowledged by participants.

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1. Ibid., S.6.
2. [1966] Suit No. 0/26A/1965, unreported.

In fact, one learned Senior Magistrate admitted that the level of dowry remained as high as ever. He said: "I know how much I had to pay for my own wife".

During the debate on the Bill for The Limitation of Dowry Law in the Eastern House of Assembly, some Members opposed the Bill mainly on the ground that "the law might be passed but it is one that will be hard to implement".[1] The Honourable Minister of Welfare who moved the second reading of the Bill, assured Members that other steps had been taken to ensure compliance with the Law.

> "The Government does not propose to leave this matter at passing this Bill. In order to make it effective a further step is necessary, namely, the registration of marriages. This also is recommended strongly by the Bride Price Committee. It is for Local Government Bodies to take action. A circular will be sent to all Local Lovernment Councils requiring them to make bye-laws to make compulsory the registration of marriages in their areas. When each marriage is registered the amount of dowry paid and the amount of petty expenses, and to whom paid, will be recorded in each case. I am sure that this House will agree with me that this step has long been needed, and I seek the co-operation of Members in ensuring that it is carried out".[2]

The most flagrant abuse of The Limitation of Dowry Law, noted by the present writer, was evidenced by the registration of marriage particulars at the Local Government Offices at Onitsha and Nsukka. As will be seen shortly, parties to a customary marriage were allowed to register with impunity, marriage contracts which showed that they had paid and received as dowry, sums of money ranging from ₦34 (£17) to ₦1,700 (£850). Of 217 customary marriages registered at Onitsha in 1975, only fifty of the husbands paid dowry within the legal limits of £30 or ₦60. Most of the fifty husbands were Onitsha indigenes. Onitsha has successfully limited payment of dowry to ₦40 (£20) for indigenes of Onitsha and ₦60 (£30) for non-Onitsha men who marry Onitsha women.

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1. See Parliamentary Debates, Eastern House of Assembly, Official Report, 28 March, 1956, p.675.
2. Ibid.,p.674.

It may be noted that all the parties who signed the Certificates and the Registers which stated that they had given or received an amount exceeding £30 dowry, were committing a crime. In many cases, the contract for the payment of dowry involving large sums of money was reduced to writing and pasted at the end, or on the reverse side of the registration form, and kept in the Local Government Office. No attempt was made to prosecute the offenders.

The abuse of law in Nigeria has been noted by various writers.[1] In many cases the law enforcing agencies make no effort to enforce the law. Government's tolerance of breaches of laws invites contempt of the law generally; it fosters the impression in the average Nigerian man or woman that laws are made for law books, and possibly for lawyers, but not to be obeyed. This is particularly relevant in the case of laws relating to marriage.[2] If a law cannot be enforced, it should not remain on the statute books.

The intention here is not to advocate witch-hunting to ferret out concealed breaches of the law, but where the breach is brought to the notice of the Government authorities, as it was in the registration of these marriages, two examples of which are given below, there is no excuse for non-enforcement of the law.

Receipts attached to Marriage Registrations at Onitsha Local Government Office

No.1

Imo State

2nd November, 1976.

Sir,

The Bearer Mr. I.O.(a) of Umuhu-Okabia, Orlu, married my daughter under native law and Costum [sic]. He paid the dowry, the sum of one thousand, seven hundred Naira (₦1,700.00) only.

Signed: J.

Occupation of husband - trader.
Occupation of wife - Primary School teacher.

(a) Names withheld in order to protect the identity of the parties

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1. See e.g. Kasunmu and Salacuse, op.cit.,p.79, with reference to breaches of laws limiting the payment of dowry; see also Nwogugu, Family Law in Nigeria, op.cit., pp.42, 51.
2. See below, Chapter X, pp.133-140.

No.2

3. 1. 77

Receipt

I, Mr. E.O.(a) of Ohukaba Awoldemili in Orlu Division of Imo State of Nigeria marrys [sic] the daughter of O. A. of Isieke Awoldemili and of the same division and of the same State,
The dowry for the girl called Lavina O. was settled to be one thousand (₦1000.00) Naira and the sum of nine hundred Naira was paid cash to O. on behalf of the daughter called Lavina O.

Signed: E. O.
and four witnesses
O. A. and four witnesses

(a) Names withheld in order to protect the identity of the parties.

Before the enactment of The Limitation of Dowry Law in 1956, several local communities in the former Eastern Region had passed local laws regulating the level of dowry in the community, in exercise of the powers conferred upon native authorities by the Native Authority Ordinance,[1] with the approval of the Lieutenant-Governor of the then Eastern Region. For example, the Ikwerre-Etche Federated Native Authority (Ikwerre Clan Area) (Marriage) Rules, 1953, provided: "Notwithstanding any custom or practice to the contrary the maximum amount of any dowry payable in respect of any marriage shall not exceed the sum of thirty pounds",[2] and petty expenses not to exceed five pounds.[3] Twenty pounds of the dowry was to be paid to the father or other legal guardian of the bride, and ten pounds to the mother.[4] A penalty of five pounds or imprisonment of two months, or both, was provided for any person who pays, demands or receives any payment in excess of these sums.[5]

1. See Native Authority Ordinance, Cap.140, Laws of Nigeria, 1948 Revision, which empowered Native Authorities, inter alia, to make rules relating to the use and alienation of land and to declare and modify native law and custom, s.25(1)(xxvi).
2. Section 4(1)
3. Ibid., s.3(1)
4. Ibid., s.4(2)
5. Ibid., s.5

In Onitsha, the traditional labour-service dowry had been replaced by cowries. In 1900 it was fixed at £10. By 1910, it had risen to £17, and by 1915, £60 to £70 was being paid.[1] Because of the agitation of young men who could not afford the high dowry, and were forced to remain unmarried, and the fear of fathers with young daughters that their daughters will be seduced as a result, the Onitsha Native Authority fixed the amount of refundable dowry at £32. During the following years, the incidental expenses of marriage increased appreciably, until by 1938, the cost of getting married was £80 to £100. In 1938 the Native Authority again intervened and fixed the amount of refundable dowry at £17, and petty expenses at £3 for indigenous Onitsha men.[2]

The marriage system in Onitsha with reference to payment of dowry is working remarkably well. The Ekwueme age-grade was delegated the task of ensuring that the rules were observed. No case of anyone paying or demanding a higher dowry than the maximum was discovered during field-work. Although a few girls complained that their parents were not being adequately compensated for the expenses of rearing them, the people are generally satisfied with the level of dowry which, having regard to the cost of living in Nigeria at present, and the value of the bride's outfit with which she is sent to her husband's home, is merely symbolic.

It may be noted that, although the dowry and other customary presents paid by the bridegroom to the bride and her parents have been limited by statute, or by local laws of the community, the household articles and other property traditionally given to the bride when she is sent to her husband's home have not been similarly restricted in value. The Bride Price Committee, in relation to these presents stated:

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1. Bride-Price Committee Report, 1954, op.cit., p.5.

2. Information given by informants interviewed at Onitsha.

> "We consider that the giving of presents by the parents of a bride when she goes to her new home should be regarded as entirely voluntary. A bride should not expect more than the bare essentials with which to start her new home and the cost of these should not exceed £15. Wealthy parents should, however, be free to give as they choose."[1]

Gifts given to the bride when she is taken to her matrimonial home is traditional among most Igbo communities. Equiano, who wrote in the early eighteenth century mentions these gifts as including "portions of land, slaves and cattle, household goods and implements of husbandry".[2]

Many lands in Onitsha were given to daughters as wedding presents by their families in traditional society, and this accounts for the fact that quite a few Onitsha families now own plots of land in several different and widely separated areas of Onitsha.

Today, the value of these wedding gifts has soared, and may include landed property, sewing machines, cookers, refrigerators assorted expensive household furniture and equipment, and a liberal supply of foodstuffs. In Onitsha, the entire village of the bride usually subscribes to purchase her outfit. Regardless of the social status of the girl, if she comes from one of the larger villages, her wedding gifts from the village can be worth more than ₦500. A wealthy indulgent parent, in addition, may give his daughter costly equipment, including land and a car. For his forty Naira outlay, therefore, the husband may get in return, property costing several hundreds of naira, and this makes marriage to an Onitsha woman a profitable venture.

May the wife in these circumstances claim that the husband has been bought?

The success of the Onitsha people at controlling the level of dowry serves as an object lesson for the Government.

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1. Bride Price Committee Report, 1954, op.cit.,p.49, par.2.

2. Equiano, op.cit., p.3.

Laws made locally are more likely to be successful than those enacted by a central authority, far removed from the people who are meant to observe the laws. Although some people wilfully break the law, others commit breaches of the law because of ignorance of the law. When laws are made locally by the people themselves, everyone knows the law, and they themselves act as watchdogs to see that the laws are observed. In many cases, when laws relating to marriage are enacted by the central legislature, the existence of the laws are not brought to the notice of the ordinary village people.

One of the questions in the questionnaires distributed during field-work was to suggest ways by which laws limiting dowry can best be enforced. Many of the people interviewed, or who answered the questionnaires, suggested that control of dowry should be delegated to the traditional local rulers - chiefs or kings - whom the people by custom, have an obligation to obey. The peoples' views are invariably taken into account in the passage of local rules and regulations. This method has been adopted with success in some of the Northern States. For example, in Maiduguri, informants stated that when the Government wishes the people to pursue a certain course of action, or to obey a law, it is relatively easy to do so through the Shehu of Bornu, whom the people are traditionally accustomed to obey, and whom they revere and respect.

B. Marriage, Divorce and Custody of Children Adoptive Bye-Laws, 1958

The Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958,[1] provides a standard dowry of £10, and other gifts and expenses to a total value of £24. This figure may, subject to the approval of the Commissioner for Local Government, be varied by a resolution of a local Council which has adopted the Bye-Law. The Bye-Laws have been adopted by several local Councils in

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1. W.R.L.N. 456 of 1958.

the Western States including Ibadan District Council. The Ibadan District Council (Marriage, Divorce and Custody of Children) Bye-Laws, 1965 provides as follows:

" 3(1) No dowry or betrothal presents in excess of the following shall be demanded or recoverable by any person:

(i)	itoro (gift for first engagement	£2.10
(ii)	obi and isanlelori (actual dowry)	£10.
(iii)	ibowo (allowance for bride's parents	£5.
(iv)	dresses	£5.
		22.10

(2) Any person who demands more than the amounts in par.(1) shall be liable on conviction to a fine of £10 or in default of payment to imprisonment for two months with hard labour".

This Bye-law seems to be generally obeyed. Everyone knows the maximum amount of dowry that can be legally demanded or paid. There seems no incentive for parents to inflate the dowry for their daughters. As previously seen, a recognized customary marriage without payment of dowry may be contracted among the Yorubas. If the dowry demanded is too high, the parties can contract a marriage by "mutual consent only", and parents are aware of this fact. Although the social status of such a marriage may be lower than a marriage by payment of dowry, it is a legally recognized marriage. Yoruba women show a greater tendency to disregard the wishes of their parents with reference to marriage than Igbo, Ibibio, or other Nigerian women.

Generally, the level of dowry among the Yorubas has always been lower than among the Igbos, and less importance is placed on the amount of dowry among most Yoruba communities.[1]

No penalties are imposed by the Ibadan District Council Bye-Laws for infringement of the dowry regulations, but as will be later seen, in the case of a divorce, the amounts that are refundable through the courts are strictly regulated by the Bye-Laws, and no greater sum will be recoverable, even in cases where a greater amount has been actually paid.

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1. See Stanley Childs, "Christian Marriage in Nigeria", 16 Africa, 1946, pp.238-246 at p.242.

Other District Councils have also adopted the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958, but many of them have modified the schedule and have stipulated a greater amount of dowry than that recommended in the schedule. For example, the schedule stipulates a dowry of £10, but the Oka and Odo-Otun District Councils stipulate that the dowry shall be £12/10, while the Ijero District Council fixed the dowry at £20, excluding other petty expenses.[1]

C. Other Statutory Provisions

The Declarations of Customary Law of Marriage, of a few native authorities in the Northern States, prescribe maximum dowry payable and refundable in their respective areas. An example of such Declarations is the Daura Local Authority Declaration of Daura Native Marriage Law and Custom) Order, 1972.[2] Dowry is not limited by the Declaration, and "shall consist of such property as may be agreed by the parties to the marriage". Pre-betrothal marriage gifts are, however, limited. The maximum marriage property to be given by the bridegroom to his bride is set out in two schedules, applicable in the case of first, and second and subsequent marriages respectively.[3]

As shall be seen later[4] in the discussion on marriage according to Islamic law, in addition to the amount given to the girl's father, the traditional dowry of customary law, a sum of money, dower or sadaki (Hausa term for dower) is also payable. In classical Islamic law, this sum is not fixed but depends on certain variants. Some of the Native Authority Declarations include in the maximum dowry payable, the bride's dower or sadaki. In the Daura Declaration, the term dowry is interpreted to include the

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1. See Ekundare, Marriage and Divorce under Yoruba Customary Law, op.cit.,p.77.
2. N.C.S.L.A.N. 7 of 1972.
3. Ibid.,s.6.
4. See below, Chapter IX, pp.50-52.

"sadaki", and in accordance with Islamic Law, is not fixed. Some Authorities, however, have laid maximum amounts for both payments. For example, dowry in the Borgu area must not exceed £15 (₦30), including sadaki.[1] In Biu Native Authority area the maximum dowry is also £15.[2]

The Local Authority (Modification of Bornu Native Law and Custom Relating to Marriage) Order, 1971 provides that the bride-price shall not be less than £1, and not more than £10. The dower or sadaki as stipulated in section 5 must not exceed £10 in cash and £20 in clothing and other articles.

As in the case of The Limitation of Dowry Law in the Eastern States, the Bornu Local Authority's attempt to limit the payments of dowry or sadaki is generally disregarded. During field-work in Maiduguri, the consistent complaint of the young, and in some cases, older men interviewed, was the high cost involved in getting married, especially where the girl had never been previously married. The total outlay involved sums ranging from ₦500 upwards. The problem is discussed further with reference to Islamic law marriages.[3]

It has been mentioned previously[4] that certain communities operate a double-level system of dowry - "big-dowry" and "small-dowry" systems. The "big-dowry" marriage usually involves a considerable amount of expenditure on ceremonies and payments, and in the early years of this century the total cost of this type of marriage amounted to £300 to £400, or even more among the Kalabari communities. In 1921, the Kalabari National Assembly attempted to limit the dowry in a big-dowry (Iya) marriage to a maximum of £50. This was observed for three or four years, after which there was a gradual return to the old scale. In 1942, the unions and associations of the areas again brought the problem of

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1. Declaration of Borgu Native Law and Custom Relating to Marriage and Divorce, N.A.L.N. 52 of 1961, s.5(1).
2. Declaration of Biu Native Law and Custom Relating to Marriage and Divorce, N.A.L.N. 9 of 1964, s.4(1).
3. See further below, Chapter IX, p.50 et.al.
4. See above, Chapter III, pp.254-257.

high dowry before the Chiefs. The Council stipulated that the maximum dowry payable for a "big-dowry" marriage should not exceed £20, or £10 where the contracting parties were from the same house. When the Bride-Price Committee visited the area, in 1954, however, the cost of a "big-dowry" marriage was up to £80 to £100 on any girl.[1]

5. Modern Level of Dowry Payments

A. Among the Yorubas

The present level of dowry among the Yorubas generally is relatively low in comparison with most Igbo communities. This seems to have always been the case as the available evidence shows, at least from the time of the introduction of English currency. In 1946, Childs[2] stated that in the Igbo country, the dowry is £25 or more, but in Yorubaland it is only about £5. He says: "That makes an important difference: a dowry that would be accepted in the Yoruba country would be regarded as no dowry in the Ibo".

Dowry among the Yorubas has not risen drastically if the general rise in the cost of living is taken into account. For example, in Savage v. McFoy,[3] the marriage was contracted in 1900, and the ano (dowry) included the sum of five guineas in cash. Johnson, writing in 1921 states:

> "Well to do families rarely require more than ten heads of cowries in these days, in early times, one head was considered ample - only as a token."[4]

He estimated the value of one head of cowrie as sixpence. Ten heads would therefore be less than a pound, which was probably the sum paid by the generality of the people. Ajisafe, in 1924,[5] stated that if the parents of the girl

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1. See Bride-Price Committee Report, op.cit., p.32.
2. Childs, "Christian Marriage in Nigeria", op.cit., p.242.
3. [1909] 1 Renner's Gold Coast Report, 504.
4. Johnson, History of the Yorubas, op.cit., p.114.
5. Ajisafe, Laws and Customs of the Yoruba, op.cit., p.53.

are in a good position the sum of fifty shillings is paid to them as dowry, but if they are poor, it may be as much as fifteen pounds or even more. Fadipe records that up to 1918, the amount of the money payment was considerably less than five pounds - two pounds ten shillings was a common figure in Abeokuta.[1] Bascom notes that by 1937 payment in cash had risen to thirteen pounds.[2] In 1974, a columnist of the Nigerian Daily Times stated that among the Yoruba, "those who claim to be modern can ask for as much as ₦300 (£150) excluding other incidental expenses.[3] But the highest dowry recorded among Yoruba women interviewed during field-work was ₦120 (£60), and the average dowry allegedly paid was ₦30.[4] As will be shown later, the general cost of living has risen considerably.

B. Among the Igbos

The level of dowry payable among the Igbos varies from community to community.[5] Variations existed in the traditional society, and continue to exist in the modern society, but generally it may be stated that there has been an upward rise in the level of dowry payable in most communities which, in many cases, far exceeds the general rise in the cost of living.

In 1938, Basden noted the rising level of dowry among the Igbos: He says:

> "A prospective bridegroom may be faced with costs amounting to £100 or more, according to the social standing of the girl, her personal charms and qualifications, whereas in the olden days, the price varied from the equivalent of a few shillings to a few pounds".[6]

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1. Fadipe, Sociology of the Yorubas, op.cit., pp.77-78.
2. Bascom, The Yoruba of South-western Nigeria, op.cit.,p.59.
3. See Tayo Adetola, "Bride Price and the Nigerian Parents", Daily Times (Nigeria), 26 April, 1974.
4. There is some evidence that a higher level of dowry is payable among Yorubas in Lagos; see e.g. Lagos Weekend 8 July, 1977, p.3 and Lagos Weekend,22 July, 1977, for cases in which the sums of ₦120 and ₦88, were allegedly paid.
5. See Bride Price Committee Report, op.cit. pp.9-46.
6. Basden, Niger Ibos, op.cit., p.216.

The Bride-Price Committee found that changes in the traditional dowry was due to the impact of Western civilization. Pseudo-forms of currency such as cowries and manillas, brass and iron rods were used for trading instead of the original barter. Men took up employment which left them no time in which to render the traditional labour services. The dowry was therefore paid in the available currency and gradually became fixed at a level within the range of the ordinary palm cutter, farmer or labourer. It did not remain constant throughout the years but varied with the general prosperity of the people. In many areas there was a fall in the level of dowry during the years of depression in the early 1930's. For example in Njikoka, by 1919 the dowry payable had risen to £60 in cash, exclusive of incidental expenses which brought the total to £100. But during the depression of the 1930's the range of dowry fell to £8 to £40.

During the war years, an unprecedented rise in the levels of dowry payable occurred and service men are held to have been largely instrumental in causing the rises. The position was described by the Bride Price Committee:

" 28. Many of them entered the Army as young unmarried men and when they found that the Army pays marriage allowances they soon became alive to the advantages of acquiring a wife. Money was dispatched to their parents who were asked to look around and find them wives. Girls were called upon to marry young men they had either never seen or had forgotten and the period of betrothal, so important in the traditional system, had no place in such marriages. Soldiers returning from overseas who had not yet acquired a wife came home with the object of doing so as quickly as possible. Men with daughters of marriageable age were dazzled by the money they were offering and often made their daughters marry them, irrespective of the fact that they had already been betrothed to others and in complete disregard of the girls' wishes. Instead of arrangements being made by the two families the soldiers negotiated themselves with the parents of the girls they wished to marry. The dowry rose. Often it was paid in one lump sum, instead of by instalments. Gradually the idea dawned that to marry off one's

daughter was a way to acquire wealth and that idea has persisted".[1]

In addition to the contribution of the servicemen, the general rise in the cost of living was reflected in the rise of dowry levels. During the war there was more money available generally and less things to spend it on.

Since the end of the war prices generally have continued to rise and so has the level of dowry. For example, in the Oratta community of Owerri Division, the cost of getting married including a dowry of £15, was £18.10. The influence of servicemen during the war caused the dowry to rise and, at the time this community was visited by the Bride-Price Committee, the cost of getting married to an uneducated girl was £90, including the dowry of £65. The actual dowry had risen to more than four times the pre-war level, but the cost of the customary gifts had risen to more than seven times their pre-war prices. For an educated girl the total cost was £150.[2]

Dowry in Owerri Division has continued to rise and perhaps the highest level of dowry to be found in Nigeria exists in this Division. The marriages registered at Onitsha Local Government Marriage Registry, which were examined by the present writer showed that parties from Owerri Division paid the highest amounts of dowry.[3] The least amount of dowry for a marriage contracted by parties from Owerri was ₦275 (£137.10), and the two highest amounts recorded at the Registry, ₦1000 and ₦1,700 (or £500 and £850) - were paid by Owerri husbands. (see Table 6:1).

A lecturer at the Institute of Management and Technology, an Owerri indigene, who at the time of the field-work for this thesis was searching for a girl whom he could marry, reported that he could not get a suitable girl for less than ₦1,500-₦2,000, although he did not want a highly educated girl.

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1. Bride Price Committee Report, op.cit., p.5.
2. Ibid., generally.
3. See Table 6:1.

Other Igbo areas also show a high level of dowry. For example, in 1954, the dowry in some areas of Nnewi Division had risen from its pre-war level of £15-£29 to £90-£180; in Ogidi from £5 to £10 with an absolute maximum of £20 to £60-£150; in Awka, the dowry up to 1943 was about £8;ithadrisen to £100 for an illiterate girl and £150 for a girl with an elementary education; in Orlu Division the dowry of £20 to £30 in 1940 had become £80 to £200 or even £300.[1]

Statistics collected at Onitsha Local Government Marriage Registry Office give an indication of the present level of dowry among the Igbos generally. Although these customary marriages were registered at Onitsha, they were contracted by parties from various parts of Igboland, and further afield, since Onitsha, as previously noted,[2] is a large commercial centre. Most of the registrations were from the non-indigenous Onitsha population. The sums registered as being paid as dowry ranged from ₦34 to ₦640. The statistics are tabulated and shown in Table 6:1 below. The marriages were registered during the year 1975. In 1977 however, two dowries of ₦1000.00 and ₦1,700.00 respectively were paid, and an examination of amounts registered for the first six months of 1977 shows an equal steady increase. The agreements registered for the payment of ₦1,000 and ₦1,700 are reproduced above.[3] It can thus be seen that the level of dowry rose from a maximum of £150 (₦300.00) in 1954 to £850 (₦1,700.00) in 1977.

To confirm the general rise in dowry the following newspaper comments may be contrasted:

In 1956, Freeman wrote in the Sunday Times:

> "When you charge fifty pounds for the hand of an illiterate daughter, ninety pounds for another who has passed standard six and a hundred and fifty pounds for one with grammar school education, you are not merely demanding the customary payment of dowry,...They call that amount simply 'price' and since the commodity in that case is the would-be

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1. Bride Price Committee Report, op.cit., pp.12-15.
2. See above, Chapter I, p.62.
3. See above pp.472 and 473. Refund of twice the amount of dowry is also the recognized way in which wives may divorce their husbands in some of the Northern tribes - see Meek - Northern Tribes, p.218.

bride, such a payment can hardly be anything if not bride-price".[1]

In 1974, in the Nigerian Daily Times, Adetola[2] wrote:

"When it [dowry] all started the fee was a token one and in some communities it was as low as five naira (₦5) - maybe because of the state of economic development - but things have assumed such ridiculous dimensions and the price is steadily rising. In the recent past, some parents have asked for as much as ₦1,600 for their daughter. New Nigerian of September 3rd, 1969, reported that bride price at Otukpa in the Idoma Local Administration in Benue-Plateau State was ₦1,600. Among the Yoruba those who claim to be modern can ask for as much as ₦300 excluding some other incidental expenses.

TABLE 6:1

STATISTICS OF PAYMENT OF DOWRY REGISTERED AT ONITSHA

Total number of marriages registered - 217

12	paid below	₦40
38	" between	₦40 - 60
4	" "	₦61 - 100
12	" "	₦101 - 150
18	" "	₦151 - 200
68	" "	₦201 - 250
14	" "	₦251 - 300
20	" "	₦301 - 350
5	" "	₦351 - 400
8	" "	₦401 - 450
1	" "	₦451 - 500
10	" "	₦501 - 550
1	" "	₦551 - 600
6	" "	₦601 - 650
217	marriages	

1. Patricia Freeman, "The Psychology of Bride Price - The Voice of Eve", Sunday Times, Nigeria, May 13, 1956, p.7.
2. Tayo Adetola, "Bride Price and the Nigerian Parents", Tayo Daily Times, Nigeria, 26 April, 1974; see also Aniagolu, op.cit., pp.101-107.

C. Among other communities

Among many of the other communities, the rise in the level of dowry has not been steep. For example, among the Nupes, Nadel reports that the dowry has undergone great changes. From £3 value in pre-British days it had risen to £10, £15 and even £20. At the time he made his investigations in 1934-1936, it had fallen to £5 and £10. In 1936 he found cases where a dowry of £9 and £10 had been paid.[1] This rise, comparatively speaking, is a modest one. Similarly, among the Igbirra, the traditional dowry of three years marriage-service for the bride's father had been replaced by a payment of £11 by 1955.[2]

In some societies the rise has been higher. For example, among the Ibibios, traditionally, dowry was paid in goats and ranged from ten to twenty-five in number. Later manillas were used, and the number varied from 800-4000, although as a general rule it did not exceed 1,200, equivalent to £15. In 1954 the dowry ranged from £15 to £50.[3] Since 1954 it seems to have risen considerably, at least in Eket. Information from an Eket family revealed that 200 manillas had been paid for the mother of the family nearly 80 years ago. This was equivalent to about £1. For the daughter of the family, who was married around 1930, £37 was paid. For the granddaughter of the family, an undergraduate at an American university, ₦1000 (£500) dowry was paid in 1977. The family is a respectable one, and the grandmother's husband had been a Christian minister. This may be regarded as a fairly high rise in dowry, but what does it represent in terms of real value? If the maximum traditional dowry of 25 goats is taken, it would be worth at ₦40 for a goat, exactly ₦1000. In many areas in Nigeria a goat was being sold for ₦30 - ₦50 at the end of 1977. In

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1. Nadel, A Black Byzantium, op.cit., p.350; see also Forde, et.al., Peoples of the Niger Benue Confluence, op.cit., p.43.
2. Ibid.,op.cit.,p.68.
3. See Bride Price Committee Report, op.cit., p.41.

terms of actual value, therefore, the dowry has not risen.

Among the Efiks of Calabar, 12 guineas are paid to the bride herself, as dowry, ₦16 to her father, and ₦10 to her mother by the bridegroom, at the present time. In addition, a trunk box containing articles such as clothes, jewels, shoes etc. is also given to the bride, according to the inclination and wealth of the bridegroom.[1] Efik people insist that dowry in their communities has never risen beyond this level, and among some groups it is not refundable in the case of a divorce. It has been previously noted that Efik women have a high social status and legal rights, for example, rights of inheritance, denied to some other Nigerian women.[2]

Among the pagan Fulani, dowry has always been low, and was purposely kept low, due to the instability of married life among newly married couples. The parents fear liability in cases of desertion or separation.[3]

Mention has already been made of the rise in the level of dowry payable for a "big-dowry" marriage among the Kalabaris.

Among the Okrika Ijaws, the dowry of a "big-dowry" marriage has also risen. Formerly manillas were used in the area and the dowry consisted of the following:

2 cases of "Okuru" (Native woven cloths).
23 manillas.
6 pitchers of tumbo wine.
8 yards of real Indian cloth.
7 or more pieces of Akwete (Native woven cloths).
£1 to the bride's father
5/- to £1 to the bride's mother.
1 bottle of whisky to the Head of the House (or 1 guinea),
Several Fene cloths (Portuguese blankets).[4]

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1. Information obtained from informants at Calabar: Special thanks are hereby recorded to Mrs. Veronica Effiom, Librarian at Calabar High Court, and her assistant Florence Kubiangha. See also Forde, Efik Traders of Old Calabar, op.cit., p.14; See also Bride Price Committee Report, op.cit., pp.45-46.

2. See further, below Chapter XIII, p.430.

footnotes 3 and 4 continued.....

In 1954, the dowry for this type of marriage ranged from £60 to £80.[1] In a "small-dowry" marriage among the Okrikas "there is no dowry payment and no ceremony". An expenditure of £5 to £10 is involved and the two families merely gather and drink. It may be noted that all the children of such a marriage belong to the wife's family and they answer her family name.[2]

6. The Factors influencing the quantum of dowry

In many areas of Nigeria, the quantum of dowry payable for a wife depends on certain factors such as the education of the girl, her social status, beauty and other qualities.[3] The wealth and social status of the bridegroom or his family also play a prominent part in deciding the level of dowry payable. Ajisafe[4] says of the Yorubas:

> "If the girl is highly connected and beautiful the husband should give a specially valuable dowry befitting the girl's status, hence the maxim, "Bi omo ba ti ri li a se ana re",The status of the girl determines the value of the dowry".

But he also says that more is paid to the parents who are poor than to those who are in a good position.

Similarly, Basden notes that among the Igbos, "The social rank, age and personal qualities of the girl are all assessed."[5] There is evidence that in other traditional societies, the level of dowry was sometimes dependent to

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Footnotes 3 and 4 continued.....

3. See Wilson-Haffenden, The Red Men of Nigeria, op.cit.,p.116.
4. Bride-Price Committee Report, op.cit.,p.33, par.217; See also Talbot, Tribes of the Niger Delta, op.cit., pp.189-193.

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1. Bride Price Committee Report, op.cit., p.33.
2. See Bride Price Committee Report, op.cit.,p.34,par.223.
3. See generally, Bride Price Committee Report,op.cit.
4. Ajisafe, Laws and Customs of the Yoruba, op.cit., p.53; cf. Ekundare, Marriage and Divorce Under Yoruba Customary Law, op.cit.,p.19: "The status of the girl determines the value of the dowry".
5. Basden, Niger Ibos, op.cit., p.216.

some extent on the social status of the bride and bridegroom, but generally, except for the daughters of chiefs and kings, there was not much difference in social status of the people, and in many societies, whether a girl was beautiful or not was irrelevant, and did not affect the amount of dowry paid for her.[1] For example, among the Efiks of Calabar, the social status of either bride or bridegroom, or the youth and beauty of the girl did not affect the level of dowry.

With the introduction of money payment, added emphasis is placed on the qualities of the girl, the social status of the prospective bride and bridegroom, and other factors. In many communities, especially among the Igbos, a higher dowry is demanded for an educated girl. For example, in the Nnewi area around 1954, an illiterate girl attracted a dowry of about £90, a girl with standard VI education about £120, while as much as £180 may be paid for a Higher Elementary certificated teacher.[2]

In Orlu Division, while £80 to £200 had to be paid for an illiterate girl, another £100 had to be added for an educated one. Sometimes, however, as much is paid on behalf of a beautiful illiterate as on that of a less attractive educated girl, though generally literacy adds at least £50.[3] In Mbaise there is a heavy premium for education. In 1954, the Bride Price Committee found that the dowry on illiterates ranged from £80 to £120, on semi-literates from £150 to £160 and on a girl with standard VI, £200 or more. Girls with Secondary School[4] qualifications were not usually married for less than £250. Today the dowry for an educated girl in this area ranges from ₦1000 (£500) to ₦2000 (£1000).

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1. Among some Ibibio communities, certain specific articles had to be given by the prospective husband if the bride was the first daughter of the family, see Udo E. Akpan, The Methodist Contribution to Education in Eastern Nigeria, Ph.D. dissertation Boston University Graduate School, 1965, p.103. The gifts included a he-goat, a ram, a hen, seven bundles of afan (vegetable) palm fruits and a bundle of firewood, all fetched by the man himself, as well as three brass rods, nsei (red chalk) and other small things as sacrifices.
2. Bride Price Committee Report, op.cit., p.10.
3. Ibid., p.15.
4. Ibid., p.26.

Four of the six Native Authorities in the area, maintained a differential dowry for the non-educated and educated girls in their recommendation to the Bride Price Committee. For example, three Authorities recommended £40 for an illiterate, £60 for a Standard VI, and £80 for a girl who had Secondary School education.[1]

The reason for maintaining a difference in the level of dowry paid on behalf of educated and non-educated girls given by most communities was that it was necessary in order to encourage parents to send their daughters to school. It was said that parents would not send their daughters to school, if education would have no effect on the amount of dowry paid. Inherent in this argument is the theory that dowry compensates the parents for the expenses incurred in rearing the girl, including expenses involved in education. There is evidence, however, that some communities which have no differentials in dowry payment dependent on education, nevertheless educate their daughters. For example, in the Owuwa Anyanuri group of communities, where inheritance is mainly matrilineal, dowry has been kept relatively low, and there is rarely a difference for educated girls.[1] Among the Abiriba group the actual dowry in 1954 was £2.15 for a farmer and £3.5 for a trader or civil servant. The differential is based on the fact that a farmer is expected to render labour services during the betrothal period. In spite of this relatively low level of dowry, compared to other Igbo-speaking communities, parents educated their daughters in order to enhance their prestige and to secure more highly educated sons-in-law. Similarly, among the Onitsha people, where dowry has been kept low for a number of years, parents do educate their daughters.

Differentials in the payment of dowry, whether based on beauty, education, or social status relegate the transaction to the nature of a "purchase", deprive it of

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1. Ibid., pp.24-27.
2. See Bride Price Committee Report, op.cit., p.19.

its "token" character, and debase it altogether. The element of bargain involved is consistent with buying of any other commodity in the Nigerian markets.

7. Principles of Law Relating to Dowry

A. To whom is the dowry payable?

As a general statement it may be said that dowry is payable to the parents of the bride. How the dowry received by her parents is shared varies from community to community, but usually the father receives the largest share, followed by the mother, and other members of the extended family.

(1) Among the Yorubas

The dowry is paid to the parents of the bride, and there is no evidence that other members of the family are legally entitled to be given any amount of the money paid, although they are entitled to share some of the other articles included in the dowry, such as the kola-nuts, and drinks. Ekundare states that dowry is usually distributed among the members of the girl's family, but whether the distribution is fair or not does not affect the legal validity of the marriage.[1] In Re Sapara,[2] it was argued that the ano (dowry) was not properly distributed and, therefore, the union was illegal. Osborne, C.J., found as a fact that many important members of the family of the bride had received no share of the dowry. He held, however, that it "would be contrary to natural justice to deprive a woman of her status as a wife because the head of the family erred in the distribution of her ano".

(11) Among the Igbos

Sharing of the dowry varies from community to community. In Aguata, Awgu, Idemili, Ihiala, Mbano,

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1. Ekundare, Marriage and Divorce Under Yoruba Customary Law, op.cit.,p.20.
2. [1911] Renners Gold Coast Reports, 605.

Njikoka, Nkwere, Mnewi, Ogbaru, Orlu, Owerri, and certain clans in Afikpo and Okigwe Divisions, the entire dowry is payable to the bride's father or other male legal guardian, if her father is dead, and legally belongs to him alone. The mother of the bride is usually also entitled to some small payment in money and to other gifts for having reared the child.[1] In most of the other communities, dowry is paid to the father of the bride, but does not belong to him exclusively. A certain sum is usually paid to the mother of the girl, but the proportion varies. For example, in the Ngwa Clan of Aba Division, if the dowry is £90, the father's share would be about £60, and the mother's £20; in Orrata Clan of Owerri Division in 1954 the father's share of the dowry was up to £100, while the mother's share was about £25, plus the customary gifts; and in Ikwo Clan of Abakaliki Division where the Bride-Price Committee found the traditional form of marriage with little modification still in existence, the father's share of dowry was two cows, one goat, four yards of cloth, two iron bars, and a red cap, while the mother's share was one goat and a supply of yams.[2]

In Onitsha the dowry is shared as follows:

A. Oji Nna - fathers dowry . . . . . ₦14.00
Oji Nne - mother's dowry . . . . . ₦ 8.00
Afe Aru - the bride's personal share . . . . . ₦ 6.00
Ife Nru Aro - the year's tribute to parents . . . . . ₦ 2.00
Oji Ozuzu Nwa - training expenses (where applicable) . . . . ₦ 2.00
Oji Diokpala-(male head of the extended family. . . . . ₦ 1.00
Oji Ada - (female head of the extended family) . . . . . 50 K.
Ekene Idunata Uno (made up of 35K. cash, two heads of tobacco, kola nuts, and two pots of wine . . . . . 50 K.
Total = ₦34.00

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1. See generally, Customary Law Manual, op.cit.,pp.238-246.
2. See Bride Price Committee Report generally.

B. Manya Efifie (general drinks)

To the father : Two pots of wine and two bottles of gin.

To the mother : two pots of wine and two bottles of gin.

Manya Oji Nna : one pot of wine and one bottle of gin.

Manya Oji Nne : one pot of wine and one bottle of gin.

Manya Oji Diokpala : one pot of wine.

Manya Oji Ada : one pot of wine.

C. Manya Idu Nwunye Uno : To the father : one bottle of wine and one bottle of gin.

To the mother : one pot of wine and one bottle of gin.[1]

(111) Among other communities

Among most of the other communities, the dowry, although received by the bride's father, is usually shared among other members of the family. Among the Efiks, for example, the father, mother, and the girl herself are entitled to definite portions of the total dowry.[2] In other Ibibio communities, the mother's share is not fixed, though in a case where £50 is paid, she will probably receive about £20, and the father £30.[3] It is said that the mother sometimes takes a larger proportion and that there are cases on record where powerful mothers have given out their daughters in marriage and received the whole of the dowry.[4] Informants in Eket insist that it is the father who is legally entitled to receive the dowry, although the mother is also entitled to a small part of it. The Okobo-Oron District Council recommended that the dowry for the father should be £35 and that of the mother, £10. The girl is not usually given any share of the dowry.[5]

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1. See Bride Price Committee Report generally.
2. Forde, Efik Traders of Old Calabar, op.cit., p.14; Bride Price Committee Report, op.cit.,p.45.
3. Ibid., op.cit., p.41.
4. Ibid., p.41.
5. Ibid., p.43.

Among the Benins, Bradbury reports that dowry payment of £12 is made to the bride's father, and unspecified gifts to the mother.[1] At Ora (Northern Edo) in 1914, the dowry was fixed at £12; £10 was given to the father and £2 to the mother.[2] At Asaba, Esenwa states that £20 dowry is given to the father, £5 to the mother, and £10 to "the girl and her numerous relations".[3]

B. The validity of a marriage if dowry is paid to the wrong person

The validity of the marriage depends on the bride's relation to the person to whom the dowry is paid. Clearly a marriage would not be valid if payment is made to a stranger, without the authority of the bride's parents. If a bride's legal father is alive, it is doubtful whether unauthorised payment to another person would render the marriage valid, but in the absence of the girl's legal father, payment made to a person who is not the recognized legal guardian, but who nevertheless is a close member of the family would not render the marriage void or voidable. The court would compel payment to the person legally entitled to it, but the marriage would be valid. In Okeke v. Okeke & Ors.[4] the plaintiff claimed that he, being the eldest son of his deceased father, and head of the family, should be entitled to the dowry payable in respect of the marriage of Ifechukwu Okoye, daughter of his late father. The Awka Magistrate Court found as a fact that the defendant, another son of the deceased, had received the dowry. The Court ordered the dowry to be paid by the defendant to the plaintiff. On appeal to the Onitsha High Court, Egbuna, J., held that the plaintiff did not give the girl away in marriage; that the marriage contract was between the first and third defendant, the husband of the

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1. Bradbury and Lloyd, The Benin Kingdom, op.cit., p.49.
2. Bradbury and Lloyd, op.cit., pp.97-98.
3. Esenwa, "Marriage Customs in Asaba Division", op.cit., p.76.
4. [1966] Suit No. O/26A/1965, unreported, Onitsha High Court, 28 March, 1966.

girl, and the plaintiff was not a party. He said:

> "The claiming of dowry and refunding of dowry is between the contracting parties".

The plaintiff was held not entitled to the dowry.

With respect, it is submitted that the plaintiff's claim was not that he was a party to the contract, but that he ought to have been, and the relevant question ought to have been whether he, as head of his deceased father's family, was entitled to give his half-sister in marriage, in preference to her full but younger brother. This would depend on the customary law of the particular community.

8. The Historical Incidence of Marriage by Consideration.

Before discussing the effect of dowry on the legal status of Nigerian women, it is pertinent to refer briefly to the occurrence of "marriage by consideration" in other parts of the world. Because there are countries, for example England, where payment by the bridegroom or his kin to the bride's parents is not an essential of a valid marriage, it is often mistakenly thought that marriage by payment of dowry is essentially an African institution.[1] But marriage by consideration is not confined to African societies and, like other African customs, is found in the comparable period of development of other nations.

Maine observes that during the "troubled era which began modern history the women of the dominant races were under various forms of archaic guardianship, and the husband who takes a wife from any family except his own pays a money price to her relations for the tutelage which they surrender to him".[2] Diamond refers to dowry, or as he calls is "bridewealth", as one of the most important institutions of marriage, and he notes that the giving of consideration of some kind at the time of marriage - either

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1. See e.g. Linton, The Study of Man, op.cit., p.178; Farran, Matrimonial Laws of the Sudan, op.cit., p.282.
2. Maine, Ancient Law, op.cit., p.139.

by goods, service, or even exchange of women - is the rule among the overwhelming majority of peoples in traditional societies.[1]

Marriage by consideration was almost universal, and a few examples will amply demonstrate this fact.

It has prevailed in all branches of the Semitic race.[2] In Babylonia, a suitor had to give his intended wife's father a bride-price or present which varied in amount according to the rank of the parties, and if he could not afford the sum required, his parents were expected to assist him.[3]

According to the book of Genesis, Jacob served his uncle, Laban for a period of seven years for each of his wives, Leah and Rachael.[4] But Westermarck notes that "the usual method of obtaining a wife in ancient Israel was by paying a bride-price called mohar or mahr"[5] This statement receives support from the fact that David was told that King Saul "desireth not any dowry but an hundred foreskins of the Phillistines" for the marriage of his daughter Michal. David therefore slew two hundred Phillistines and brought their foreskins to the king that he might be the king's son-in-law. And Saul gave him Michal his daughter to wife.[6]

Among the ancient Arabs, a bride-price, mahr was given by the bridegroom to the father or guardian of the bride; this custom has survived in Islamic law where it has been confounded with sadak.[7] Before the advent of Islam, the payment was made to the father or guardian of the bride. Islam reformed the law so that the payment now

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1. Diamond, Primitive Law, op.cit.,p.225; see also Hobhouse, Wheeler and Ginsberg, The Material Culture, op.cit.,p.153; Radcliffe-Brown and Forde, African Systems of Kinship and Marriage, op.cit.,p.47.
2. Westermarck, The History of Human Marriage, op.cit., Vol.II, p.407.
3. Ibid.,p.407.
4. Genesis, Chpt. 29, 16-30.
5. Westermarck, History of Human Marriage, op.cit., Vol.II, p.407.
6. See 1 Samuel, Chpt. 18, 17-27; see also L.M. Epstein, Jewish Marriage Contract: A Study of the Status of Woman in Jewish Law, p.12.
7. Westermarck, History of Human Marriage, op.cit., p.408.

known as sadak is given to the girl herself.[1] In the Northern Emirates of Nigeria, where Islam prevails, it will be seen later, that although sadak is paid and may be used mainly for the benefit of the girl, a dowry is also paid to her father or guardian, a relic of the old customary law of marriage by payment of dowry.[2]

Marriage by consideration was also widespread in old China. A present had to be given by the suitor's father to the bride's father, and the amount payable was stipulated by the negotiators of the marriage. The marriage could not be celebrated until the stipulated amount was duly paid. Several emperors tried to educate the people to eliminate money as a factor of the marriage contract and many famous writers condemned the practice, but it proved ineradicable.[3]

In Japan marriage by consideration was said to have been common,[4] as it was also among the lower classes of Hindus,[5] although Manu attacks the custom and forbade it altogether. The laws of Manu provides: "No man who knows the law must take even the smallest gratuity for his daughter; for a man who, through avarice, takes a gratuity is a seller of his offspring".[6] Westermarck asserts that notwithstanding the prohibition in the laws of Manu "marriage by purchase occurs to this day even among high castes and is frequently practised among the Sudras".[7]

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1. See Umaru Abdullahi, "The Influence of Customs upon Marriage Under Islamic Law in the Far Northern States of Nigeria" in African Indigenous Laws, eds. T.O. Elias et.al., op.cit., pp.123-124, Westermarck, op.cit., pp.408-409.
2. See further below, Chapter IX, pp.56-58.
3. See Olga Lang, Chinese Family and Society, (New Haven Yale University Press, 1946), pp.36-37; see also Mace and Mace, Marriage East and West, op.cit.,pp.154-155; Westermarck, op.cit.,p.406.
4. Westermarck, op.cit., p.406.
5. Mace and Mace, op.cit.,p.155; Westermarck, op.cit., pp.409-410.
6. The Laws of Manu: The Sacred Books of the East, Vol. XXV, trans. by G. Bühler, Vol.III, p.51.
7. Westermarck, History of Human Marriage, op.cit.,Vol.II, p.410. The accepted custom of the East generally however is not for the bridegroom's family to pay a bride-price, but for the bride's family to provide her with a dowry to take to her husband's home.

Westermarck also states that "marriage by consideration was a custom of all Teutonic peoples".[1] The Kentish law of King Aethelbirht speaks of a man buying a maiden with cattle.[2] In Germany, the expression to "purchase a wife", was in use till the end of the middle ages.[3] Marriage by consideration prevailed among the early Slavs, and among the Southern Slavs Westermarck notes that it partially prevailed until fairly recently.[4] In Serbia, at the beginning of the ninth century, the price for girls reached such a height that Black George is said to have limited it to one ducat.[5]

The ancient Celts also paid a price for their brides. In Ireland the price usually consisted of cattle to which the bridegroom and his family, as well as his neighbours, subscribed. A caution was taken from the groom for restitution in case the bride died childless within a certain date, limited by agreement, and if this event occurred, every man's beast had to be restored to him.[6]

Brides were purchased in seventh century Britain, as is revealed by the Laws of Wessex,[7] and Trevelyan, the English social historian notes that, in the middle ages, usually thought of as a period of chivalry and love, the choice of partners for marriage had normally nothing whatever to do with love. He says:

> "...often the bride and bridegroom were small children when they were pledged for life, and even if adults, they were sold by their parents to the highest

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1. Westermarck, History of Human Marriage, op.cit.,Vol.II, p.411; Diamond, Primitive Law, op.cit.,pp.225-228.
2. Laws of King Aethelbirht, chpt.7; see Diamond, op.cit., pp.224-226; Westermarck, op.cit.,p.412; Goodsell, op.cit., pp.198-199.
3. Westermarck, op.cit.,p.412; Goodsell, op.cit.,p.199.
4. Westermarck, op.cit., p.413.
5. Ibid., p.413;see also Goodsell, op.cit., p.199 - "In Saxon law in the early 9th century women were sought in marriage for 300/."
6. See Thurneysen, Studies in Early Irish Law, op.cit., p.127; Arensberg and Kimball, "The Small Farm Family in Rural Ireland" in Sociology of the Family, edit. by M.Anderson, op.cit., p.32; Westermarck, op.cit., pp.413-414.
7. See O'Faolain and Martines, op.cit.,p.101; see also Vinogradoff, op.cit., Vol.I, p.252.

> bidder...If the victim destined for the altar resisted, rebellion was crushed - at least in the case of a daughter or female ward - with physical brutality almost incredible".[1]

These examples show that marriage by consideration was fairly universal, and this fact should be borne in mind in any consideration of the future of dowry in Africa in general, and in Nigeria in particular. Simons bewails the fact that South Africans generally are unaware of the historical parallels, as in his opinion, a knowledge of them might assist non-Africans to correct the wrong notions that they hold about the significance of dowry. He concludes:

> "Africans too would benefit from a deeper insight into the antecedents of European marriage customs. The recognition that lobola [dowry] is not a peculiarly African practice should enable them to be less sensitive and on the defensive when discussing the institution. If they were to see it in its historical perspective, they might the more readily realize that lobola belongs to an archaic type of marriage and is unsuited to the needs of a progressive community".[2]

9. Dowry and the Status of Women

What effect has the system of payment of dowry on the status of women? Many writers and others refer to the system as one of purchase of women, dowry being the price paid. Adherents of this viewpoint regard women subject to the dowry system as chattels or property offered to the highest bidder.[3] The opinion that women are property to be purchased is not supported by the evidence of the operation of the dowry system in traditional societies. In addition

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1. Trevelyan, English Social History, op.cit., pp.64-65.
2. Simons, African Women, op.cit., p.87.
3. For views for and against marriage by consideration, see Richard Thurnwald, Black and White in East Africa, (London: Routledge and Sons Ltd. 1935), p.147; Radcliffe Brown and Forde, op.cit.,pp.46-47; Phillips, Survey of African Marriage, op.cit.,pp.360-370; Obi, Ibo Law of Property, op.cit.,pp.186-187; Mudiaga Odje, The Law of Succession in Southern Nigeria and Special reference to the Mid-Western Region, Ph.D. dissertation, University of London, 1965, pp.268-269; Coker, Family Property Among the Yorubas, op.cit.,p. 53; Basden, Niger Ibos, op.cit., pp.217-218; Diamond, Primitive Law, op.cit., pp.226-228; Meek, Law and Authority, op.cit., p

to the fact that the principle of sale as a commercial transaction was unknown in the self-sufficient domestic economy of pre-literate peoples,[1] there is no evidence that Nigerian husbands, even in the earliest period of their known history, ever had the power of life or death over their wives. There is no evidence that they had the legal right to dispose of their wives by sale or otherwise,[2] a power illegally exercised by Englishmen as late as the nineteenth century.[3]

Although Nigerian husbands generally had a limited right of chastisement in relation to their wives, excessive brutality could result in the removal of a wife from her husband's home by her family.[4] There is, therefore, no justification to regard women as the property of their husbands, bought by the payment of dowry.[5].

It has been seen that, in most communities in traditional society, payment of dowry was in the nature of a token of the value of a woman, and an appreciation of the care and expense involved in rearing her.[6] The occasional labour services, and relatively small amount of farm produce given to the parents of the bride by the bridegroom could not be justifiably regarded as a price paid for her.

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1. See Diamond, Primitive Law, op.cit., p. 226.
2. See Obi, Ibo Law of Property, op.cit., p.186; Uchendu, "Concubinage Among Ngwa Igbo", op.cit., p.189; but see Meek, Northern Tribes of Nigeria, op.cit., pp.216, 218; "An Idoma husband could sell an unfaithful wife into slavery if, on the dissolution of marriage she fails to refund his bride price".
3. See Braddock, The Bridal Bed, op.cit.,pp.155-157; The Times 17 March, 1796, mentions the sale by John Lees of his wife for sixpence. "At a sale attended by hundreds of people at Dudley in 1859, the highest bid was six-pence. Three years later, at Selby, Yorkshire, the price of a pint of beer was the best offer made...Even these prices, low though they were did not touch rock bottom, for at Alfreton, in 1882, the price of a glass of common ale was accepted, so eager apparently was the husband to get rid of his spouse". See also Thomas Hardy Mayor of Casterbridge (London: Reprint, 1964).
4. See Obi, Law of Property, op.cit.,p.186, and below, Chapter VIII.
5. See Ogongo v.Asekele and Anor.[1967] N.M.L.R.21; Seberu v. Sunmonu [1957] 2 F.S.C. 33, 34.
6. See above, pp. 459 et.al.

However, the present level of dowry operating in some societies in Nigeria, and the temptation it offers to unscrupulous parents to sacrifice their daughters welfare in exchange for a high dowry payment, increasingly gives the system the appearance of a sale, justifying the criticism of "wife-purchase".

Writing in 1938, Basden expressed the opinion that it was within the bounds of possibility that, within the next few years, dowry as such will be abandoned by Igbo communities.[1] Sixteen years later, the Bride Price Committee reported that everywhere they went they made the suggestion that the payment of dowry should be abolished altogether. A few of the educated men and women agreed with the idea : the "vast majority received the suggestion with horror".[2]

In fact, Mr. J.A. Ekpe, one of the members of Parliament who opposed the Limitation of Dowry Bill in the Eastern House of Assembly, stated that he had been asked by the people of his constituency to oppose the Bill. As several of the reasons he gave for his objections are relevant to this discussion, his speech on the second reading of the Bill are set out at some length:

> "Mr. Speaker, I must oppose this Bill because I have been asked by my people to oppose it. After the release of the Report of the Bride Price Commission I went round my constituency and read to them the recommendations of the Committee and my people were alarmed. They said they could never agree to the Regional Government coming to meddle with the marriage system. Sir, marriage as we all know is as old as man, in fact it is older than Government, and this Bill, if it is passed, will disrupt our local customs and traditions.
>
> The Bill is premature. We have not yet reached the stage when we can regulate bride price in our community.
>
> The very fact that the Minister stipulates the amount of money to be paid for a bride really shows that he admits the principle of bride price which in

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1. Basden, Niger Ibos, op.cit.,pp.217-218; Contrast the opinion of Lord Lugard expressed at the beginning of the present century: "so engrained and so universal is the conception of wife-purchase that I fear it will be long before the progress of education will effect the emancipation of women", Political Memoranda,1906, op.cit.,p.230; See also Ward, Marriage Among the Yorubas, op.cit., p.21.

2. See Bride Price Committee Report, 1954, op.cit., p.8.

a civilised nation should be abhorred. How does the Minister arrive at £30, as the price for a bride? What is the basis? How does he arrive at that? It seems unscientific.

Again, Sir, the Bill emphasises money, as if it were the main aim of marriage. Another wicked thing that the Bill does, Sir, is to make us regard our daughters as interest on investment. Marriage becomes investment and daughters become interest. Such a thing should be discouraged by Government. Its outlook is wild, Sir. It now appears that if I marry a wife, that is an investment. If I have a daughter she begins to yield interest, and the interest on my one daughter is £30; if I have two - £60; and if I have three - £90 interest. I think that is not moral at all, Sir".

The Bill, as I have said, is premature. If we are convinced that we want to adopt the English system of marriage let us wait for a time when we shall say so and abolish bride prices altogether.

There is another point. There is no half and half measure. Marriage is a holy institution and this Government cannot meddle with it. We still have in our community, Sir, some old men and old women who still expect and take the whole of their future subsistence on the daughters they have.

Now by stipulating or laying down the exact amount of money to be paid we are going to increase the difficulties. In fact, we are going to drive marriage underground and bring about a black market in marriage - that is what is going to happen. As my honourable Friend from my division has rightly pointed out, if the Government says you must pay £30 for a bride and I cannot afford to pay the £30, certainly what I am going to do is to try and find a way of eloping with a girl".[1]

Some of the points mentioned in this speech will be discussed later, but it is pertinent to note that the economic aspect of the system loomed large, and the chief objection seems to be the economic loss to the parents if dowry level is fixed.[2]

Thirty-nine years after Basden made his prognosis of the abolition of dowry, and twenty-three years after the

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1. Parliamentary Debate, Eastern House of Assembly, Official Report, Vol. II, 28 March, 1956, p.675.

2. See Childs, "Christian Marriage in Nigeria", op.cit., p.243: the dowry system "tends to put too much emphasis on the money side, and while money must be considered under any system, it is most undesirable that it should take a large part".

Bride Price Committee's Report, the present writer found the same measure of opposition to the abolition of dowry experienced by Basden and the Bride Price Committee. During field-work, informants, particularly women, and older Igbo men, gave a variety of reasons for the retention of the dowry system. The reason which appeared most frequently was the economic reason - that dowry compensated parents for the time and money spent in bringing up their daughters. Appreciation for the bride, that the husband would know the value of the girl, and erase the idea that women were obtained cheaply - ranked high in the answers given by women; while the fact that dowry commands the respectful obedience of the wife, and enables the husband to control her, was foremost in the replies given by men. The commercial aspect also appeared in the opinion that dowry demonstrates the wealth of the parties concerned, and gives prestige and high status to both families - the paying and the paid. In the religious sphere, it was said to be necessary to appease the God of marriage, while legally, it was the opinion of all interviewees that dowry was essential to make the marriage valid and to distinguish it from concubinage.

Informants stress the fact that the payments are only a token, or a formality, and can in no way be equated with purchase of the woman as such. One is tempted to ask if it is only a token why different amounts are asked for, and paid, in accordance as to whether a girl is illiterate, ugly, or comes from a poor family, or whether she is educated, beautiful or is the daughter of a prestigious family?[1] In modern Nigeria, possession of education increasingly qualifies for a higher level of dowry payment in some areas.

One may also ask, if dowry is merely a token, why is it repayable, and in some societies, the amount paid

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1. See Nsugbe, Ohaffia, op.cit.,p.82; Bride Price Committee Report, op.cit., pp.10 et.al; Uka, op.cit., p.16 Basden, Niger Ibos, op.cit., p.26.

is doubled on repayment,[1] despite years of marriage life, and regardless of the wear and tear suffered by the wife in the process of child-bearing?

Nsekero, in his article, "The Nature and Function of Marriage-Gifts" states:

> "To the traditional African mind the bride's reproductive capacity is so valuable that its acquisition needs some recompense, token and merely symbolic though this may be".[2]

If this is so, why in many societies in Nigeria does a woman, long past child-bearing age, have to refund the "token? What is dowry a token of - respect, appreciation or friendship between the families of the spouses? Why then does the appreciation, respect or friendship disappear on the death of a woman's husband, and she can be cruelly hounded by his relatives for the refund of dowry, as was done in Osiekiyovwe and Anor. v. Akporuvbeku.[3]

Whatever the nature of dowry in traditional society may have been, undoubtedly, in many areas of Nigeria today, it has deteriorated to simple bargaining, no different from the transactions conducted by the ordinary housewife daily in the markets, except that the subject of the haggling over price is not foodstuff, or clothes, but women, the cornerstones and foundation of any nation.

The evils of the dowry system.

The evils and injustices wrought on women by the present system of dowry are many, but a few examples will illustrate some of the difficulties women are confronted with because of the laws relating to the payment and refund of dowry.

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1. See further above,p.484,n.3; see also Talbot, Tribes of the Niger Delta, op.cit.,p.180: "among Owerri if a girl ran away from her betrothed, the latter could claim back double dowry"; refund of twice the amount of dowry paid is also a recognized method of divorce among some communities in the Northern States, see Meek, Northern Tribes of Nigeria, op.cit., p.218.

2. Nsekero, op.cit.,p.103; Cf. "Rattray, Ashanti Law and Constitution" (London: Oxford University Press, 1956), p.24: "all that is bought and sold is a sexual

footnotes 2 and 3 continued.....

Among the disadvantages inherent in the present dowry system may be mentioned the following:-

(a) it jeopardises women's opportunity for marriage and encourages prostitution;
(b) it lowers women's opportunity to have a free choice of spouse;
(c) it may be confused with sale of women and is conducive to slavery;
(d) it produces an adverse psychological effect on some husbands;
(e) it is conducive to hostilities between families and often results in endless claims and counterclaims;
(f) it robs many women of the custody of their children;
(g) it hinders women from divorcing undersirable husbands.

(1) Jeopardy of marriage opportunities: The Bride Price Committee reported that the high level of dowry in the former Eastern Region of Nigeria was responsible for a fall in morality. Both men and women are forced to remain single long past the usual marriage age because the man cannot afford the high dowry demanded. In some areas, it was alleged, girls flocked to the towns to practise prostitution when they failed to get married in their villages.[1]

There is evidence that high dowries prevent young men from marrying. Many men have to work for years in order to accumulate the high sums demanded. Some men who dare to borrow money in order to get married spend a large proportion of their married lives paying interests to unscrupulous money-lenders. Egwuonwu, writing on marriage problems in Nigeria, gives an eye-witness account

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Footnotes 2 and 3 continued...

2.... prerogative, coupled with the benefit of her services and later those of her children, the last two within strictly defined limits.

3. [1973] Law Notes and Review, 1973, No. 1; for facts of this case, see below, Chapter VIII, p. 696.

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1. See Bride Price Committee Report, op.cit., p.6.

of a young man's property being auctioned to the public three months after his marriage. He had borrowed money to finance the dowry and wedding ceremony expenses, but unfortunately lost his job soon after.[1]

In the process of field-work for this thesis, the present writer had the opportunity of talking to many young people in different parts of the country. Quite a few of the young men stated that they simply could not afford to get married, after years of government and other employment, because of the prohibitive costs involved. Undoubtedly, the high level of dowry remains the chief single reason for enforced bachelorhood, with its attendant temptations. The insistence of dowry as a legal essential of marriage results in many beautiful girls "becoming financially shipwrecked on the island of non-matrimony".[2]

(11) Restriction of the free choice of spouse

The dowry system encourages parents to wed their daughters to the highest bidder, with little regard for the happiness of their daughters. Choice of spouse becomes largely a matter of who can afford to pay the dowry demanded - a sure recipe for mismating and resultant disaster in marriage. This is clearly illustrated by the case of Ubuku v. Ubeku.[3]

The evidence in Ubeku v. Ubeku[4] revealed that the two parties were never in love. In fact the respondent had been in love with someone else before she was approached by a cousin of the petitioner, on his behalf. She did not know the petitioner until after he had paid some money to her parents as dowry. It was then that she went to Lagos and saw the petitioner for the first time. The petitioner

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1. Anikputalu Dike Egwuonwu, Marriage Problems in Nigeria, (Nigeria: Ijideani Publisher, 1975), p.45.
2. See Euna E. Amechi, "The Legal Rights of Women in Nigeria in Relation to the Law of Property", in A Year to Remember, Papers delivered at a Symposium, University of Nigeria, Nsukka, May, 1975.
3. [1968] 2 All N.L.R. 180.
4. Ibid.,p.180.

was in very good employment and was in search of a woman who could enhance his social position. The respondent was a very pretty girl and it was the opinion of the Judge that the petitioner must have paid a handsome sum for her. Evidence advanced by both parties showed that the marriage broke down completely within a short time. The wife alleged that she was subjected to a series of indignity including severe beatings in order to compel her obedience. Commenting on the case the Judge said:

> "This is an unfortunate case but as long as the system of marriage by payment of dowry without any basis of love between the parties continues, there would continue [to be] a breaking up of homes because the present day educated Nigerian woman would not stand up to a system that makes the husband the master in the home. It is however inequitable for a husband who has to pay a large amount of money as dowry, and in addition expend money on the merriments connected with the marriage ceremony, to agree to subject himself to a woman, who for all intents and purposes he had actually acquired for monetary consideration".[1]

This statement emphasizes the psychological effect of payment of dowry, and leads to a discussion of another ill-effect of the dowry system.

(111) Psychological effect of the dowry system

Any man who has gone through years of scrimping and saving, depriving himself of essentials in order to amass the high sum of dowry demanded for his wife, invariably becomes the victim of an irresistible psychology which compels him to regard her as an item of property. Freeman, in her article on dowry observes:

> "When a man pays bride-price he tends to look on his new wife as property. She is in the same category as his chairs, pots, goats or his clothes, part of his domestic equipment".[2]

Although Begho accepts this as true among the illiterates in the rural areas of Nigeria, he seems to deny

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1. Ibid., p. 185.
2. Freeman, "The Psychology of Bride Price: The Voice of Eve, Nigerian Sunday Times, 13 May, 1956, p.7.

this attitude among the educated,[1] but Freeman maintains that quite surprisingly, it is "very true not merely among the unsophisticated masses in the rural areas, but almost equally so among the more enlightened elements in the urban areas", and that it is one of the most important factors contributing to the break up of home and family life.[2]

There is evidence that the psychological effect of payment of dowry is not confined to uneducated husbands. Many educated men believe that the earnings of their wives for whom they have paid a dowry, legally belongs to them. Any sums in excess of what they have paid, earned by the wife is regarded as interest on the capital expended.[3] Two cases illustrate the general tendency of Nigerian husbands in this respect.

In Tagbo v. Tagbo,[4] the petitioner, a teacher, claimed that her husband, a barrister, suggested that she should assure him that she would pay over to him the salary she would earn as a teacher. When she pointed out that it was not proper to discuss such a subject while they were on their honeymoon, and especially since she had not yet found a job, the respondent nagged her and refused to speak to her. When she later refused to deposit her salary in his bank account as he requested, the respondent stopped her from working, and locked her up in a room for one week. He said that the purpose of the marriage had been defeated, since he came from a poor family, and was not interested in remaining married to a woman who wanted to spend her salary as she pleased. The petitioner alleged that as a result of

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1. Begho, "Law and Culture...",1971, op.cit., p.37.
2. Freeman, "The Psychology of Bride Price", op.cit.,p.7.
3. See Ralph Linton, The Study of Man, op.cit., p.178; wives are a highly desirable form of interest bearing investment.
4. [1971] Suit No. O/ID/71, unreported, Onitsha High Court.

her refusal to hand over her salary, the respondent frequently beat her and refused to eat food prepared by the servants on the ground that he saw no reason why he should "waste his money in buying a woman", and yet eat food prepared by servants. Because of his cruelty she was forced to leave the matrimonial home at one o'clock in the morning. The husband, in his answer, stated that he wanted them to have a joint account, so that they can pay the expenses of his relations (as well as hers), who were studying at universities. The wife was granted a divorce on the ground of her husband's cruelty.

In the second case, Henson v. Ekpo,[1] the parties were Ibibios, married according to customary law. The wife claimed that the husband, a trader, drove her away from the matrimonial home allegedly because she was "an aged woman not befitting him as a wife". Attempts at reconciliation failed, and eventually the wife was granted a divorce. The husband then sued her for the salary she earned during the period after he had driven her away, but before she was granted the divorce. He claimed that during this period, although they were separated, she was still his lawful wife and therefore he was legally entitled to her salary. His claim was dismissed by the Customary Court on the ground that since he had driven his wife away and she refused to reconcile with him, he was not entitled to her salary. The judgment implied that if she was still living with him as his wife, he would have been entitled to her salary.

These are not isolated cases.[2] They illustrate the attitude of many men towards the earnings of their wives. Many of the midnight beatings of wives at the

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1. [1972] Suit No. 277/72/8361, unreported, Eket Customary Court, 23rd June, 1972.

2. See also Uwaemelulam v. Uwaemelum [1972] Suit No. AD/ID/72, unreported, High Court Aba, 1972, where the petitioner alleged that all her marital troubles only began when she refused to hand over her pay-packet to the husband, as usual. After her refusal, the slightest offence resulted in severe beatings from the husband, a Public Health Inspector; see the comments of Thompson, J. in Akinsemoyin v. Akinsemoyin [1971] N.M.L.R. 272 at 275.

campus of the University of Nigeria are allegedly administered by husbands whose wives are reluctant to hand over their pay-packets intact. Some of these cases are so bizarre as to be almost unbelievable, but they portray the psychology inherent in the dowry system.[1]

(IV) The similarity between dowry payments and sale

In some cases, the dowry system is so similar to a sale, that it is often difficult to distinguish whether the transaction is a sale, or a genuine marriage. Such a difficulty faced the Court in R. v. Akwari and Anor.[2]

The accused, a brother and a sister, were jointly charged with two counts of slave dealing, contra section 369(2) of the Criminal Code Act. Each of these counts charged the accused jointly with transferring or taking a girl in order that she should be held or treated as a slave. In each case a marriage was proposed between the girl and a relative of theirs. They persuaded the parents to allow them to take the girl to meet the proposed husband. The understanding was that the girl should be brought back within a specified time, and if the intended bridegroom was willing, dowry would then be fixed. In each instance the girl was not returned to her parents. In fact, both girls were never seen again. Neither girl was of marriageable age, and no payment of dowry was made. Both transactions were separate, though practically simultaneous. The accused claimed that the girls were given in marriage by their parents. Waddington, A.J., noted:

> In slave-dealing cases where [the] subject is a girl [the] question almost always arises whether [the] transaction was a marriage or a sale, and it

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1. Nigerian women often complain that foreign women married to Nigerian men are generally treated better than they are. One reason for this may be the fact that no dowry is usually paid for foreign wives.

2. [1941] 16 N.L.R. 37.

is often a matter of some difficulty to discern a definite dividing-line between the two.[1]

Both involve a money payment and a laxity in the observance of such ceremonial as attends a native marriage would result in there being little left to distinguish the transaction from a sale.

The importance of this point is that if the transaction must be held to be a sale, then the parents and others taking part would have to be held to be accomplices in a slave-dealing transaction. If, on the other hand, their intention is a bona fide marriage (whatever secret intention those who take the girl may have) then they are not accomplices.

In the present case this question must be decided for this purpose.

A suspicious feature is the presence of Irozuoke as witness to both marriages and there are other somewhat dubious features.

On the other side there is the important point that no money was paid in either case before the girl was handed over, and it is difficult to believe that the parents would have allowed the girls to go without payment, if their intention had been a sale and not a marriage.

The evidence supports the theory that both were marriages - the presence of witnesses, the stipulation for the early return home, and so forth - and so I hold them to have been".[2]

The accused were found guilty of slave dealing.

In the debate on The Age of Marriage Law in the Eastern House of Assembly, the Minister of Welfare, in introducing the Bill noted that it is "well known to the Police and Administrative Officers and others that there are cases, which amount to slavery, which cannot be prosecuted because the guilty party is able to claim that the child he has bought as a slave is his wife".[3]

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1. For a similar opinion, see Lugard, Political Memoranda, 1906, op.cit., p.230.
2. R. v. Akwari and Anor.[1941] 16 N.L.R. 37 at p.41.
3. Parliamentary Debates, Eastern House of Assembly, 28 March, 1956, p.671.

(V) The system results in hostility between families

Claims and counterclaims, which in some cases may be prolonged for years,[1] often result in hostility and acrimony, not only between the spouses, but between their respective families. The girl's parents often threaten to remove their daughter from the husband's house if he is slow in paying the balance of dowry. In a few cases, they seize the children of the marriage if they are not paid. Hostility more often occurs, however, when the dowry has not been refunded on divorce, and this can often lead to murder, as it did in the Queen v.Okoburu.[2] In this case the accused returned home and found that his wife had left him and gone to the deceased with all her property. He demanded refund of his dowry of £79. 17. 3d, from the deceased. The deceased offered the sum of £10, at a meeting convened for the purpose by the elders of the town. This offer was refused by the accused, and he was supported by the elders to the extent that they warned the deceased that if he did not add another £25, the £10 he offered would be treated as "adultery fee" and the woman would be returned to her husband. At a subsequent meeting, however, the elders changed their minds, and turned against the accused. A quarrel ensued,and the meeting dispersed without the accused getting his money or his wife. Later that night, the accused felt frustrated. He went and demanded his money directly from the deceased, and killed him when the latter failed to refund the dowry. Held: the taking away of his wife by the deceased, the failure of the deceased to pay the dowry, and the change of attitude of the elders in favour of the deceased, amounted to provocation. Considering the standard of life of the accused, the Judge, Savage J., thought there was evidence of sufficient

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1. See Suit No. 135/20, High Court Record, p.438, IBA. Prof. 3/2 Civil Record Book, Register of Records of Appeals from Native Courts, 1942, Ibadan National Archives, where the Appellant appealed against the decision of the Bale Court which ordered him to refund dowry paid in 1922, on a girl who had died after the marriage, whose husband had died, and whose father who received the dowry had also died.

2. [1959] Charge No. P/14C/1959, unreported; High Court, Port Harcourt, 1959.

provocation to reduce the charge to manslaughter.

The other evils inherent in the laws governing the payment and refund of dowry will be examined in the next two following Chapters.[1]

10. Summary and Conclusion

A. Summary

Marriage by payment of dowry is contracted by the overwhelming majority of Nigerian couples. The most significant legal function of dowry is that it is an essential for the validity of most marriages contracted under customary law. In traditional society the payments took the form mainly of labour services rendered by the bridegroom accompanied by gifts of farm produce such as yams and corn, or fish, game or small domestic animals like goats or sheep. In a few communities, the level of dowry has remained relatively low, but in others, it has risen to such an extent that the system can justifiably be described as "wife-purchase". Although the rises in the level of dowry payments may compare favourably with the rise in the general cost of living in Nigeria, the very fact that marriage payments are measured in terms of "cost of living" lend an economic flavour to the transactions which derogates from the idea that it is only a token of appreciation of the trouble and expenses involved in rearing the bride.

Legislative attempts to curb rises in the level of dowry have not been generally successful, and although women are the chief victims of the system, they are the most vociferous protesters against its abolition. There is no evidence that dowry will be voluntarily abolished in some communities, for example, the Igbos, in the foreseeable future.

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1. See below, Chapter VII, pp.592-607 and Chapter VIII, pp.695 *et al*.

B. Conclusion and recommendations

Many people in Nigeria are hypersensitive about the payment of dowry and use emotive terms and reasons to justify its continuance. The dowry system, formerly practised by nearly all countries, and now rejected as an archaic type of marriage totally unsuitable to the moral ethos of a progressive society, however, is the greatest single factor contributing to the depression of the legal status of women in marriage.

Many of the social functions attributed to the payment of dowry in traditional societies, for example, the fact that dowry was responsible for the relatively stable marital relationship in traditional societies, no longer obtain in modern societies. The number of divorces in Nigeria testify to the fact that stability of a marriage cannot be ensured by the payment of money. The legal functions which still remain, and in some communities are rigorously applied, adversely affect the status of women in most cases. As shall be seen later, a woman for whom a high dowry has been paid may be unable to sever the legal bonds which tie her to an undesirable husband if she cannot afford to refund his dowry.[1] As previously seen many other evils result from the dowry system, especially in relation to women. Should the dowry system be abolished? Hastings has correctly said that:

> "When a system is recognized to be anachronistic and outmoded or has become evil to the core, why keep it with the excuse that it was better in another time? As it is practised today in the Southern Cameroons and in certain other territories, the bride-price is a plague, an obstacle to the development of Africa. It is illusory to try to correct the system with odds and ends".[2]

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1. Madam Bardi, a wealthy business woman from Bendel State stated that while she was a prison wardress at a Government prison in Warri, most of the prisoners "were women who had left their husbands and were serving sentences for not having returned their traditional marriage dowries". Many of these women were pregnant, see West Africa, 15 May, 1954, p.437.

2. Adrian Hastings, Church and Mission in Modern Africa (London: Burns and Oates Ltd., 1967), p.185.

There is no doubt that dowry should be abolished, but the pertinent question is, can it be effectively abolished?

The greatest obstacles to the abolition of dowry are the desire of parents to get as much dowry as they can from prospective sons-in-law, and the reluctance of women generally to even consider the abolition of dowry payments, for fear that their status will be endangered as a result.[1] Not many people object to dowry being fixed at a reasonable amount; ₦10, ₦15 and ₦20 have been most suggested, but everyone admits that enforcement is difficult, if not impossible. Among suggestions made by informants, the cooperation of local chiefs and other traditional rulers in making and enforcing the laws relating to dowry seems most feasible. The suggestion that all dowry should be paid through the medium of the courts, or the local traditional authority, and receipts obtained therefor, is worthy of note. None of these suggestions is foolproof.

The first step that Government should take is to render the payment of dowry legally ineffective by legislation. In other words, the payment of dowry or other monetary consideration to the parents or legal guardian of a female person on account of her marriage should no longer be a legal necessity for a valid marriage in any system of law operative in Nigeria; neither should the refund of any property or money given be an essential of a valid divorce. The legal paternity of children should also be divorced from the payment of dowry, and no man should be entitled to claim legal paternity or custody of a woman's children simply because he has paid dowry on her behalf, whether she has lived with him as his wife, or not. No action involving

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1. See Binns, op.cit.,p.195, who, writing of South Africa, notes: "It is the women themselves who prefer it and insist upon its maintenance"; see also Hilda Thurnwald's observation in respect of women in East Africa - "The girls do not want to have all these customs abolished and are in favour of a rising bride-price which flatters their pride;" see also, Thurnwald, Black and White in East Africa, op.cit.,p.148; Hastings, Church and Mission op.cit.,p.173.

payment or refund of dowry, whether in contract, or otherwise, should be entertainable by the courts. Payment of dowry need not be made illegal. At the present time, gifts including money are given to the bride by her family at the time of her marriage, but these gifts are not compulsory, neither do they have any legal effect on the validity of a marriage, or on the dissolution of, a marriage. The payment of dowry should have a similar status.

Money or other property contributed voluntarily by either family should be given to the spouses directly to enable them to have a good start in marital life, and should be the joint property of both spouses, except where given with specific conditions to the contrary. In the event of divorce, such joint property should be shared equally between the spouses. In the event of death of either party, the property should be shared by the surviving spouse and the children of the marriage if any.

B. Marriage Ceremonies

1. Introduction

There are wide variations in specific details of marriage ceremonies observed by the various Nigerian communities, many of which are non-legal in character. The main purposes of this discussion of marriage ceremonies are:

(1) to examine the extent to which marriage ceremonies may be indicative of women's status;

(11) to indicate the extent to which they are essential to the validity of a customary law marriage contracted by payment of dowry.

In view of the variations found even among sub-groups of the same ethnic group, the marriage ceremonies currently observed by the Onitsha community will be described. Although there may be differences in minor details, the basic pattern is similar to that which obtains among

most of the other communities[1] where marriage payments, and the participation of both families are involved, and is not drastically different from the general pattern which obtains in traditional societies.

2. The Marriage Ceremonies

The ceremonies performed on the occasion of a marriage generally involve:

(1) betrothal or engagement ceremony;
(11) marriage ceremony;
(111) the ceremony of leading the bride home.

(1) The betrothal

In traditional society, a girl's marriage was usually arranged by her parents, and the choice of spouse was mainly theirs. If the girl was old enough she would be consulted, but it was rare for a girl to choose her own prospective husband. The choice of spouse was generally made by the man's family, especially his mother and other female relatives, who made behind-the-scene advances. Invariably, a middle-man was employed, whose role was to pilot the initial formal introduction between the families, and to take an active part in each step of the betrothal and marriage.

Nowadays, however, at least in Onitsha, young people, more often than not, choose their own spouses and, depending on the strictness of the family, have considerable freedom to associate with each other before their intention to get married is made known. When the couple decide to

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1. For marriage ceremonies among the various Nigerian communities; see Elias, The Nigerian Legal System, op.cit., pp.292-295; Chukwudebe, Onitsha Quo Vadis, op.cit., pp.31-34; Forde, Marriage and the Family Among the Yako, op.cit.,pp.20-35; Talbot, The Peoples of Southern Nigeria, op.cit.,pp.443-445, et.al; Thomas, Anthropological Report...Ibo-Speaking Peoples, op.cit., Part I, p.65 et.al; Welch, The Isoko Tribe, op.cit., p.171; Meek, Northern Tribes of Nigeria, op.cit., Vol.II, p.98-102; Spörndli, Marriage Customs Among the Ibos, op.cit.,pp.116 et.al., Meek, Law and Authority, op.cit., pp.269-271; Johnson, History of the Yorubas, op.cit., pp.116-117.

marry, the girl's family would be approached and told of the boy's intention to marry their daughter. The first formal approach is not usually made by the bridegroom himself, but by his parents or other responsible member of his family.[1] If the girl's parents approve, a date is fixed for the formal betrothal.

On the appointed day, the man and his family, led by the Okpala (head of the family), and other senior members of the family, and a few close friends, take kola-nuts, two pots of palm wine and two bottles of gin to the house of the girl's father. There they are welcomed by the girl's family and presented with the customary kola-nuts. After they have partaken of the kola-nuts, the Okpala of the boy's family formally state the object of their visit, and asks for the consent of the girl's family to the proposed marriage. The presiding Okpala of the girl's family calls her and tells her the object of the visit and asks her whether they should give their consent or not to the proposed marriage. She is given a glass of palm wine. She takes a sip of it and if she consents to the marriage, she then presents the remainder to the boy and he drinks from it also. If she does not consent she hands the cup back to the Okpala of her own family. Once the girl signifies her consent, the drinks and other things brought by the boy's family are accepted and shared among the gathering. A part or the whole of the dowry is then paid, prayers are said, and good wishes for the prosperity and general welfare of the parties and their families expressed.

The importance of this ceremony, however, is the opportunity it gives for the girl to formally express her wishes and to withhold her consent if she does not agree to the choice of spouse. The formality is the same irrespective of the ages of the spouses. In some Igbo communities, this ceremony is held when the girl is an adult and can confirm or reject a match made on her behalf when she was a child. In other communities, however,

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1. In some communities the "middle-man" receives a fee for his services, see Meek, Law and Authority, op.cit., p. 274; see further Basden, Niger Ibos, op.cit., pp.215-216.

for example in Onitsha, the consent ceremony is only performed once, whatever the age of the girl.

(11) The marriage ceremony

The next important ceremony is the igo muo or actual marriage ceremony, usually performed the same day the bride is taken to her husband's house. It is a simple ceremony. The families of both parties meet at the bride's house and prayers are offered to God by the Okpala of each group, imploring his blessings for the prosperity and happiness of the spouses and the unity of the two families.

(111) The ceremony of leading the bride home

This ceremony is usually performed in the night of the same day the igo muo ceremony is performed. It consists of the formal delivery of the bride to the home of the bridegroom, and is referred to as idu uno (leading the bride to the man's house). The bride is usually accompanied by all the young people of her village who sing and dance as they lead her to her new home together with all the gifts which have been given to her by members of her village, her immediate families and other friends. Unless the gifts are very heavy, or immovable, for example land, they are taken on the heads of the young people, each person taking as much as he or she can conveniently carry. One of the purposes of this exercise is to give the village an opportunity to exhibit its wealth, evidenced by the quantity and quality of the bride's trousseau, and a car or other similar transport is never used to take these gifts, although at one idu uno ceremony witnessed by the present writer in Onitsha the gifts were loaded into open hand carts. Traditionally, the idu uno was performed in the night, but due to the opportunity it offered to the young people who participated in the taking home ceremony to misbehave, it is now the rule that the ceremony must be performed in the early evening between the hours of five and seven o'clock.

On arrival at the bridegroom's home, the trousseau

is placed where it can be seen and admired by the bridegroom's family and friends gathered for the occasion. Subsequently, the visitors are treated to kola-nuts, palm wine and other drinks, and tobacco or snuff. Speeches are made and prayers said, and the bride and bridegroom are given advice on the duties and rights of marital life.[1]

The Legal Significance of the Marriage Ceremonies

At what point of time is a customary marriage as described above legally contracted? Is it when the dowry is agreed on, partially paid, or fully paid, or when the marriage ceremony, or the leading home ceremony is actually performed, that a marriage is considered legally binding? The question is of vital importance to the legal status of women in marriage and in view of the conflicting academic and judicial opinions the position will be discussed as follows:

(a) among the Yorubas
(b) among the Igbos
(c) among the other communities
(d) conflict in judicial opinions

(A) Among the Yorubas

The majority opinion of academic writers on Yoruba customary law marriage suggests that once the consents of the prospective spouses to the marriage, and the consents of their respective parents have been given, the performance of the betrothal ceremony, accompanied by the payment of some part of the dowry, constitutes a valid customary marriage. In other words, the delivery of the bride to her husband or his family is not a legal essential of a marriage. The views of Fadipe,[2] Ajisafe,[3] and Ellis[4] to

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1. See generally, Bosah, The History and Culture of Onitsha, op.cit., pp.122-125.
2. Fadipe, The Sociology of the Yoruba, op.cit., p.73.
3. Ajisafe, Law and Customs of the Yoruba, op.cit., p.55.
4. Ellis, The Yoruba-Speaking Peoples, op.cit., p.184.

this effect have been noted previously.[1] Similarly, Coker says:

> "For our purpose it is sufficient to point out that the important essentials of a valid customary marriage are:
>
> (a) the consent of the bride and her family, and
>
> (b) the giving and acceptance of the 'Ano' (dowry).
>
> These two events are a sine qua non of a valid marriage under native law and custom and it is only when and after these functions are performed that a valid marriage is constituted;...the woman then becomes the wife of the man, and thus entitled under native law and custom to reside with him in the family house or compound".[2]

Delano, in his book The Soul of Nigeria, pointed out that the payment of dowry is the legal culmination of the marriage, but that the notoriety which usually accompanies the other functions especially the public "taking home" of the bride gives to the whole event a social sanction which is universally acknowledged and respected.[3]

These sentiments express the majority view as to the essentials of a valid marriage under Yoruba customary law.[4] In The Queen v. Oladejo,[5] the accused was charged with abduction, rape and assault occasioning harm contrary to section 361, 358 and 355 respectively of the Criminal Code Act.[6] The charges arose from the accused having allegedly lured the girl concerned out of her father's house, and bundled her into a waiting car, in the company of other lads.

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1. See above, Chapter V, pp 378-379.
2. Coker, Family Property Among the Yoruba, op.cit., p.263.
3. Delano, The Soul of Nigeria, op.cit., pp.126-127; see also Obi, Modern Family Law, op.cit.,pp.161 and 180, who lists "formal giving away" of the bride as one of the essential requirements of a valid customary marriage.
4. For opinions to the contrary see, Elias, Nigerian Legal System, op.cit.,p.293; Ward, Yoruba Husband - Wife Code (Washington Catholic University of America, 1937), p.15.
5. [1959] W.R.N.L.R. 181.
6. Cap 42, Laws of the Federation of Nigeria, 1958 Revision.

He covered the girl's face with a cloth and took her to his house where he had sexual intercourse with her. Subsequently, he also took her to two other towns where sexual intercourse between him and the girl also took place, allegedly against her will on all occasions.

In his defence, the accused alleged that he had paid consent money[1] and dowry on the girl and had given her presents of money and other articles as his prospective wife. He argued that it was not against native law and custom for a husband to go to his wife's house and bring her to the matrimonial home himself. Both the girl and her father denied that any dowry had ever been paid by the accused. Taylor, J., held that whilst the native law and custom might be as the accused alleged, the fact remained that the accused had not satisfactorily explained why the girl had not been welcomed by someone at his house as he himself had deposed to be customary for a newly wedded wife arriving at the matrimonial home. The Judge stated that on the evidence there was no doubt that the accused without having paid any dowry on the girl did take her away by force and against her will with an intent of carnally knowing her, and he was therefore guilty of abduction contrary to section 361 of the Criminal Code Act. He was found not guilty of rape.

It is evident that the Judge in this case disbelieved the accused's allegations that he had paid dowry on the girl's behalf, and that the girl had not been taken by force against her will. Had she consented to the abduction, a marriage by "mutual consent only", would have been validly contracted, whether dowry had been paid, or not, and irrespective of whether her father had consented, provided the girl was aged sixteen or above. Had dowry been paid and the girl's parents consented to the marriage and accepted the gifts and dowry, it is submitted that the

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1. "Consent money" refers to the money payment made by the bridegroom at the formal Ijohun ceremony, when the bride and her parents are formally asked for their consent to the marriage; see Johnson, op.cit., p.114; Fadipe, op.cit., pp.72-73.

fact that she was not taken to the husband's home by her own relatives in the manner customary among the Yorubas, or that she was not welcomed by the man's family when she was taken to his home would have no effect on the legal validity of the marriage.

The legal essentials of a Yoruba customary marriage contracted by payment of dowry may be summed up as:

(1) the consents of the prospective spouses;
(11) for a previously unmarried girl, the consent of the bride's parents;
(111) payment of a part o the whole of the agreed dowry, a promise to pay, or a waiver of payment by the bride's family.[1]

If the girl has been previously married, all that is necessary for a subsequent marriage are the consents of the spouses, and the refund of the former husband's dowry to him, or if he is dead, to his family. The taking home ceremony is not legally essential, although it has evidentiary value, and in fact, is performed once only for any woman.

B. Among the Igbos.

Writing in 1938, Basden categorically states as follows:

> "Nowadays, a girl is said to be engaged and the term covers the period between the payment of the first instalment of the bride-price and the last, that is, the day when the marriage contract is fulfilled. Under Ibo law and custom, the girl is technically the man's wife from the moment the first payment is accepted by the parent or guardian...

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1. Contrast, the view of Elias, The Nigerian Legal System, op.cit.,p.293: "the 'dowry' is the deciding factor, but its mere settlement does not clothe the contract with legal validity. The notoriety of the public act of the marriage ceremony would seem to be inseparable from the legal incident of the marriage payment, since the people look upon the subsequent event as indispensable to a properly solemnized marriage".

..In the eyes of the people they are legally man and wife".[1]

It is difficult to say what the writer specifically meant by this statement, but insofar as it would suggest that the couple are legally man and wife when a part of the dowry has been paid, presumably at the betrothal ceremony, it is not supported by evidence, at least as far as Onitsha is concerned. In Onitsha, a marriage is legally valid only when the ceremony of igo muo or igo mmuo ina uno (the asking for the permission of the Okpala and the family for the girl to go and live with the husband and his family) is performed.[2] Before this ceremony the man has certain rights, for example the right to claim the legal paternity of the children begotten by the girl for another man, if he has paid the dowry, or even a part of it. But he has no right to consummate the marriage before this ceremony. On the other hand, once this ceremony is performed, whether the marriage is subsequently consummated or not, or whether the girl is formally taken to the man's home, is legally irrelevant to the validity of the marriage.

This point was clearly brought home in a case in which the present writer participated during field-work in Onitsha. The betrothal ceremony had been performed, and the dowry paid in full when certain difficulties arose, and the girl's family were debating as to whether to continue with the proposed marriage or not. The elders of the family stated that she was not yet legally married, and if the union was broken off at that point, she would not be regarded as a previously married girl, but if the igo muo ceremony was performed, she would be a divorcee if the union was ended subsequently, even if the final ceremony of idu uno (taking the bride home) was not performed. The girl was warned to make up her mind one way or the other before the igo muo

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1. Basden, Niger Ibos, op.cit., p.219; cf. Jordan, Bishop Shanahan, op.cit.,p.220; a girl was not considered fully married in Ibo law until the final instalment of the bride-price was paid at a great festival which included large quantities of palm-wine"; see also Spörndli, op.cit., p.117; Talbot, Tribes of the Niger Delta, op.cit., p.180.
2. See Chukwudebe, Onitsha Quo Vadis, op.cit., p.31-32; Bosah, Groundwork of the History and Culture of Onitsha, op.cit.,p.124-125.

ceremony was performed.

Some writers[1] assert that the girl legally becomes the man's wife once the Inu mmanya (presentation of palm wine and gin) ceremony involving the payment, or promise of payment, of dowry, has been performed. This conclusion is based on the fact that the man is legally entitled to all children borne by the girl from this time, whether he is the genitor of such children or not. But legal paternity of children in customary law is not always dependent on a valid marriage. For example, a man may pay a sum of money and become the legal father of a child begotten for him by an unmarried woman. In other words, he can legitimize a child not born in lawful wedlock.[2]

The Customary Law Manual, 1977, states that betrothal entitles the man to live with the woman as husband and wife in about sixteen of the thirty-nine Divisions in Anambra and Imo States, including Onitsha Division. Whatever may have been the traditional customary law in Onitsha, it is clear that this is not the law at the present time. In fact, all Onitsha older informants deny that this was ever the law. They maintain that the igo mmo ceremony must be performed before a man has a legal right to live with a girl as husband and wife.

The provisions of the Customary Law Manual in this respect seem inconsistent. For example, section 286 states:

> "When a woman is betrothed to a man, the legal effects are as follows:-
>
> (1) The man is free to live with the woman as husband and wife in Afikpo Division, Mbaloye and Mbanasa clans of Aguata Division, Arochukwu Division excluding Ihechiowa clan, Etiti, Ezeagu, Ezzikwo, Igbo-Eze, Ihiala, Mbano, Nnewi, Ossomari in Ogbaru, Oguta, Okigwe, Onitsha, Oru, Owerri, Udi and Uzo-Uwani Divisions.
>
> He has no such freedom in other places".

Section 312, however, provides:

> " (1) A formal handing over of the bride to the bride-groom or his family is necessary for a valid marriage.

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1. See e.g. Talbot, Peoples of Southern Nigeria, op.cit., p.445.

2. See Customary Law Manual, op.cit., pp.316-318.

Local variations - This is neither nor usually done in Afikpo clan of Afikpo Division, Etiti, Ishielu, Mbano and Ogbaru Divisions."

It would seem from these two statements that in some Divisions, for example, Onitsha, Okigiwe and Owerri Divisions, although a man has the legal right to live with his "betrothed" as man and wife, the parties are not legally married until the betrothed girl has been formally handed over to him or his family. Consequently, the man who asserts his legal right and lives as man and wife with his betrothed who has not been formally handed over to him, is living with a woman to whom he is not legally married - a sort of legally recognized concubinage. Such a law does not obtain at Onitsha at the present time, and it is doubtful whether it ever did.

It is not possible to state precisely when a marriage is actually contracted among the Igbos, in view of the wide variations which exist among the different groups. For example, an essential of marriage in Ogidi is the making of a small gift known as the "uku-itor". It is usually in the form of a token payment of three pence and its acceptance by the girl signifies her consent. It is usually given after a substantial part of the dowry has been paid, and thereafter the girl goes to live permanently in the bride-groom's house.[1]

C. Among other communities

The precise point at which a marriage is contracted among the other Nigerian communities is not very clear. Among the Ibibios, Forde and Jones state that the dowry had formerly to be completed before the marriage was consummated,[2] while Talbot asserts that the "marriage takes place on the day of leaving the fatting-house for the last time, and, in some parts, after a separate gift called

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1. See Bride Price Committee Report, op.cit., p.11.
2. See Forde and Jones, The Ibo and Ibibio-Speaking Peoples, op.cit., p.77.

'The He-goats Entry' has been made by the fiance".[1] Among Oron Ibibio, Lieber records that the initial bride payment (okuk unyime nlo) is in essence the marriage contract, although the bride does not usually join her husband until after the fattening and circumcision rites are performed.[2]

Among the Efiks, Lieber notes as follows:

> "Before both families agree that the prospective partners can make a go of it they investigate each other's origin, parentage and character. Should the prognosis for a marital union be good the young man proceeds to deluge the family of his prospective bride with gifts of assorted drinks, cloths for dresses, and money. These gifts having been accepted, the young woman is considered to be married but does not yet join her husband in his home".[3]

These and other evidences[4] suggest that the payment of the dowry is the essential legal element of a valid marriage according to Ibibio customary law in general, although the marriage is not very often consummated until after the fattening and circumcision ceremonies.

An old account of marriage among the Benins states:

> "There is no marriage ceremony. A young man desirous of getting married demands the girl from her parents who rarely refuse; he gives them one or several pieces of cloth and takes his wife home. If she be too young, and show no sign of puberty, the husband confines her to the supervision of the women, who notify him when the marriage should be consummated, which is at the age of eleven or twelve years".[5]

This description suggests that the marriage is contracted by payment of dowry and the handing over of the bride to her husband. This accords with the account given by Thomas of

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1. Talbot, Peoples of Southern Nigeria, op.cit., p.451. Talbot, Life in Southern Nigeria, op.cit., p.204.
2. Lieber, Efik and Ibibio Villages, op.cit., p.61.
3. Ibid, p.18.
4. See generally, Cotton, "The Calabar Marriage Law and Custom", op.cit.,p.427; Bride Price Committee Report, op.cit.,pp.41-42.
5. Roth, Great Benin, op.cit.,p.38.

an Amoya (big-dowry) marriage among the Northern Edo-Speaking Peoples in 1910. "An Amoya wife is acquired at Fuga (Avianwu) when she is only four or five years old; the husband pays her father £5 or less and takes her away without ceremony. She is brought up in his household".[1] Egharevba, on the other hand, states that the wedding ceremonies among the Binis generally last for a period of about one week before the bride is delivered to her husband.[2]

Among the Isokos, Welch notes that the betrothal ends with the puberty rites of circumcision, when the dowry must be paid in full. He says:

> "The girl is then led at night to the house of the husband by four relations from her father's side and three from her mothers;...The next day comes the final token of her break from her old life, when her parents send messengers bearing her domestic utensils, and, after accepting them, she is henceforth a wife".[3]

In view of the varying practices[4] relating to wedding ceremonies, no general principle can be confidently stated, except that most communities regard the payment of the dowry as the legal essential of the marriage, although in almost all cases the bride is formally handed over to the husband before the marriage is consummated.

4. Conflict in Judicial Decisions

There is considerable conflict of judicial decisions on the precise moment when a customary marriage can be regarded as legally valid. For example, in Ogunremi v. Ogunremi,[5] the evidence given on behalf of both parties to the suit was that after payment of dowry, "the

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1. Thomas, Anthropological Report of the Edo-Speaking Peoples, op.cit., p.55-56.
2. Egharevba, Benin Law and Custom, op.cit.,p.17.
3. Welch, The Isoko Tribe, op.cit.,p.171.
4. See generally, Ottenberg, "The Afikpo Ibo of Eastern Nigeria", op.cit.,p.20; Thomas, Anthropological Report of the Edo-Speaking Peoples, op.cit., Part I, p.48: "It is difficult to say which part, if any, is regarded as essential - payment of bride price is undoubtedly the important feature".
5. [1971] U.I.L.R., 466.

girl is regarded as married to the man and both of them could do what they liked with themselves". This evidence was accepted by Craig, J., as correctly representing Yoruba customary law. A similar decision was reached in Re Spenser and Boyle.[1] In this case, a caveat was entered by the caveatrix against the proposed marriage between the applicant, S.A. Spencer and Wilhemina Boyle on the ground that the caveatrix and the applicant had contracted a valid and subsisting customary law marriage. It was held that the caveat ought to remain because, although the applicant stated that he was tricked into going to live with the caveatrix, whom he said he never had the intention to marry because she was ten years his senior, he had paid £20 dowry to the brother of the caveatrix. This payment constituted a lawful marriage according to Benin law and custom. Since the parties were already living together the symbolic act of handing the bride over to her husband was unnecessary.

In Opanum v. Okpanum[2] as previously noted, parental consent, mutual agreement of the parties, coupled with payment of dowry constituted a valid customary marriage according to Igbo customary law.

In Ayorinde v. Aina[3] however, it was held that the bride must be formally handed over to the bridegroom or his family in order to create a valid marriage under Yoruba native law and custom as it obtains in Lagos. This case followed the decision in Beckley v. Beckley and Anor.[4] in which it was held that the idana or betrothal ceremony among the Yorubas did not constitute a valid marriage according to customary law, and that there must be, in addition, an actual delivery of the girl to her husband's home. This decision has been criticized by legal writers[5]

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1. [1964] 2 All N.L.R. 171.
2. [1972] 2 E.C.S.L.R. 561.
3. [1964] L.L.R. 71.
4. [1943] 17 N.L.R. 59.
5. See e.g. Kasunmu and Salacuse, Nigerian Family Law, op.cit.,pp.82-83.

on Yoruba customary law and is directly contrary to the earlier decision of Savage v. McFoy[1] in which the essentials of a valid Yoruba marriage by payment of dowry was stated as the consent of the girl and her family, the consent of the bridegroom and the presentation and acceptance of the ano (dowry). Nothing was stated about the delivery of the bride to her husband.

Beckley's case was followed in Egri v. Uperi,[2] a case concerning Isoko customary law, and also in Ikedingwu v. Okafor,[3] a case involving Igbo customary law, where it was held:

> "When parties contemplate marriage under customary law and part of the dowry is paid, the girl is loosely regarded as having been married to the man who paid or on whose behalf such payments were made, but until the girl according to custom is taken to the home of the man and there is cohabitation, the marriage is not complete".

This decision introduced a new dimension to the requirements of a valid customary marriage - cohabitation. The learned Judge, Mbanefo, C.J., did not define cohabitation but in view of a similar decision in a later Supreme Court case it is necessary to examine the necessity of cohabitation as an essential of a valid customary marriage.

Cohabitation:

In the recent case of Osamwonyi v. Osamwonyi,[4] the Supreme Court approved the finding of the trial Judge that under Benin customary law, payment of dowry alone does not constitute marriage; there must be cohabitation as well. The Court did not define cohabitation. The dictionary meaning of cohabit is "to live together".[5] "Cohabitation" as used in a matrimonial sense means to dwell together as husband and wife. Matrimonial courts make a very plain distinction between matrimonial cohabitation and matrimonial

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1. [1909] Renner's Gold Coast Report, 504.
2. [1974] E.C.S.L.R.
3. [1966-1967] 10 E.N.L.R. 178.
4. [1972] U.I.L.R. 527. For the facts of this case see above p. 442.
5. The Concise Oxford Dictionary, 6th Edit.

intercourse. Although invariably combined, one may exist without the other. For cohabitation to exist, therefore, the parties must have lived together as husband and wife.[1]

Must the parties to a customary marriage actually live together as husband and wife before the marriage is considered legally valid? With due respect it is submitted that the suggestion is a startling one, and is not supported by evidence, at least, insofar as it relates to marriage among the Igbos, Yorubas, Ibibios, Benins, and other main ethnic groups. There are a few communities among the Igbos, where a "trial marriage" operates, and a betrothed woman lives in her "betrothed's house for a period of time, which may be years, before finally deciding whether her parents should accept the dowry or not to convert the union into a marriage,[2] but in the overwhelming majority of Igbo communities "cohabitation" is not a legal essential of a valid marriage. In fact the Customary Law Manual states specifically as follows:-

> 314. Cohabitation -
>
> " (1) It is not necessary for a man and woman to live together as husband and wife before a valid marriage can exist between them. A man and a woman can validly marry each other even if they have never met, and their marriage may subsist even if they never consummate it".

No exceptions to this law are stated.

A similar law applies to the other main Nigerian tribal groups, and a marriage by proxy is legally valid in most systems of customary law. To hold that a marriage has not been contracted, because there has been no cohabitation may result in injustice to women if applied as a general principle of customary law. For example, occasions often arise in these modern days, when a marriage is consummated while the girl is still living with her parents. The husband may not be in a position to obtain a house for his wife if he is employed in a distant part of the country,

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1. See further, below, Chapter VII, pp. 536-544.
2. See Sporndli, "Marriage Customs Among the Ibos", op.cit., pp.116-117; Bride Price Committee Report, op.cit., p.37; Meek, A Sudanese Kingdom, op.cit.,p.377.

he may be a student in an overseas university, or he may be constrained by mere financial straits. In any of these circumstances it may be expedient for the girl to remain with her parents for a considerable period after the marriage, and even after the birth of several children. To hold that there has been no marriage in such cases, because there had never been cohabitation, is unrealistic as it may be unjust. The Yorubas, especially, are accustomed to maintaining separate homes, and cases are not unknown in which husband and wife have never lived in the same home.[1]

Cohabitation is not a legal essential of a statutory marriage, and there is no reason why it should be introduced as an essential of modern customary marriage. In Oduneye v. Oduneye,[2] the spouses had three children, but had never lived under one roof since their marriage, although they spent time together during exchange of visits. The Judge held that the relationship of husband and wife existed even though they had never lived together under one roof in any matrimonial home.

It is customary for Nigerian men resident abroad, to contract a marriage by proxy under customary law, in many cases to a girl they had never met before. These girls are then entitled to join them abroad as their wives. The requirement of cohabitation as an essential for a valid customary marriage can put an end to such a procedure in those cases where the man is in a foreign country which only issues visas for "wives" to join their husbands. The man in such a case cannot claim that the girl "married" by proxy in his name is legally his wife until she joins him and cohabitation follows. But to join him she must be legally married to him or he would not be entitled to the necessary permission under the Immigration laws of various foreign countries.

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1. See e.g. Oduneye v. Oduneye, [1976] 2 CC.H.C.J. 439.
2. Ibid.

The requirement of cohabitation for the validity of a marriage can have other effects. For example, some communities "marry" a woman for a deceased person. Such marriages would no longer be valid, since cohabitation of the spouses is impossible.

CHAPTER VII

THE INCIDENTS OF MARRIAGE

> "Marriage is the union of a man and woman forming an association during their entire lives, and involving the common enjoyment of divine and human privileges"
>
> [The Digest][1]

1. Introduction

Customary law marriage is principally a contract, and conforms to a large extent to the rules of an ordinary commercial contract, but it has been mentioned previously[2] that marriage also creates a status, that is, the "condition of belonging to a particular class of persons [married persons] to whom the law assigns certain peculiar legal capacities or incapacities."[3]

In Hyde v. Hyde,[4] Lord Penzance, in relation to a monogamous marriage observed:

> "Marriage has been well said to be something more than a contract, either religious or civil - to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status... the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring."[4]

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1. Digest XXII, ii, i, cited in O'Faolain and Martines, Not in God's Image, op. cit., p. 46.
2. Chapter I above, pp. 100-102.
3. Allen, "Status and Capacity", op.cit., pp. 277, 278.
4. Hyde v. Hyde [1866] L.R. 1 P. and D. 130; see also Sottomayer v. De Barros [1879] 5 P.D. 94; Salvesen v. Administrator of Austrian Property [1927] A.C. 641 at p. 653. cf. Argyll v. Argyll [1965] 2 W.L.R. 790 (1965] 1 All E.R. 611, per Ungoed-Thomas, J., "Marriage is, of course, far more than mere legal contract and legal relationship, and even legal status; but it includes legal contract and relationship".

A customary marriage also creates rights and duties. These rights and duties do not only apply between the spouses, but also to third parties, and may even endure after the death of a spouse. For example, in some systems of customary law, a man owes a variety of duties to his wife's family. Thus a Yoruba husband is liable for debts incurred for the funeral celebrations of his wife's parents and grandparents.[1]

This Chapter examines the main rights and duties created by customary law between the spouses, and between them and third parties, especially their children, in so far as these latter rights and duties are relevant to the discussion of the former.

The following topics will be considered:

(i) conjugal rights and duties, including consortium and maintenance;

(ii) remedies available for breaches of conjugal rights;

(iii) parental rights and duties, including the affiliation and custody of children of the marriage.

The property rights of the spouses will be discussed in Chapters XII and XIII.

2. Conjugal Rights and Duties

(A) Consortium

The principal duties and rights of the spouses are bound up in the concept of "consortium". In English matrimonial-law, consortium means living together as husband and wife with all the incidents, legal, social and domestic,

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1. See Fadipe, The Sociology of the Yoruba, op.cit., pp. 75-77, See also Egharevba, Benin law and Custom, op. cit. p. 19 and Isaac O. Delano, An African Looks at Marriage (London: United Society for Christian Literature, Reprint, 1945), p. 33; Ajisafe, The Laws and Customs of the Yoruba People, op. cit., p. 83.

that flow from the relationship.[1] It comprises a bundle of rights and corresponding duties which are enjoyed by husband and wife; "a bundle of rights some hardly capable of precise definition",[2] and which may vary from society to society in its incidents.

Consortium in English law involves, inter alia:

(i) matrimonial cohabitation;

(ii) domestic duties;

(iii) right of a wife to use her husband's name;

(iv) matrimonial intercourse;

(v) mutual marital confidence.

How far does customary law recognize a concept comparable to that of "consortium" as described above? There is no doubt that, in so far as the concept of consortium entails rights and duties between the spouses, it exists in customary law, although, as previously noted, the particular rights and duties may differ from society to society, and variations may exist even in the same society at different periods of time. The extent to which the various incidents of consortium as stated above apply to a customary marriage will be examined.

1. Matrimonial cohabitation

(a) The right of cohabitation

Matrimonial cohabitation means to live together as husband and wife in the same house. In English law the spouses have a duty to share a common home referred to as the "matrimonial home", wherever this is possible. It may

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1. Bromley, Family law, op. cit., p. 109; see Black's Law Dictionary, 4th edit. 1968, 382; consortium refers to "the conjugal fellowship of husband and wife, and the right of each to the company, co-operation, affection and aid of the other in every conjugal relationship".

2. Per Lord Reid in Best v. Samuel Fox and Co. Ltd. [1952] A.C. 716, 736 [1952] 2 ALL E.R. 394, 401.

not be possible to always share the same roof, for example, the husband may be working away from home for most of the time, or the wife may be confined to a hospital or other institution,[1] but normally, the spouses live together in one house, and the refusal by one spouse to share a common house in the absence of a reasonable excuse may be a breach of the duty to cohabit.

Some degree of cohabitation is a common, if not almost universal feature of marriage in human societies. It has been seen above that the courts, including the Supreme Court of Nigeria, have held that "cohabitation" is an essential of a valid customary marriage.[2] A number of questions arises. What are the distinctive aspects of cohabitation as a right and duty of each spouse in Nigerian customary law? Does the concept of "matrimonial home" as known to English law exist in customary law? Must the "matrimonial home" be a common house, or a group of houses to satisfy the duty of "matrimonial cohabitation".

In traditional society, and to a large extent in the rural areas of Nigeria at the present time, it is unusual for a husband and wife to live under the same roof. The more frequent practice among all the communities in Nigeria is for the husband and each of his several wives in a polygymous family to live in separate houses.[3] This pattern also obtains where the husband has only one wife. In most patrilineal Nigerian societies, a wife usually joins her husband's household in the compound of his family. The

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1. Ibid., p. 733, per Lord Goddard: "Where the exercise of a profession or the call of duty involves prolonged absence abroad of one of the spouses, there is not an interruption of consortium, nor is there because one of them may become a permanent invalid to be waited on and nursed by the other".
2. See above, Chapter VI, p.530-5331.
3. See above, Chapter IV, p.350.

husband has a legal duty to provide a home for his wife, and she has a duty to live in the home provided for her by the husband. Each wife has a legal right to be provided with a house, or one or more rooms in a house, in the family compound, separate from the house or room of her husband and those of the other wives. The use of such a house or room is exclusive to a wife and her young children, and no-one, including her husband, can make use of her allotted accommodation without her consent, so long as she remains his wife.[1] The husband, on the other hand, also has an exclusive right of occupation and user over his own house or room, and his wives have no right of entry there except on his invitation.

A wife in customary law, therefore, has no right to share her husband's house or room any more than he has a right to share the house or room he provides for her use.[2] In such circumstances what constitutes "matrimonial cohabitation"? Is "matrimonial cohabitation" a legal duty imposed on either spouse?

The distinctive feature of "matrimonial cohabitation in customary law, unlike English law, is not the spouses living together under the same roof even in cases where such

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1. See, Fadipe, Sociology of the Yorubas, op. cit., p. 98, Basen, Niger Ibos, p. 208; Bohannan and Bohannan, The Tiv of Central Nigeria, op. cit., p. 16; Forde and Jones, The Ibo and Ibibio-Speaking Peoples, op.cit., pp. 17 and 72-73; Green, Igbo Village Affairs, op.cit., p. 18; Nsugbe, Ohaffia: A Matrilineal Ibo People, op. cit., pp. 52-55; Simon Ottenberg, "Inheritance and Succession in Afikpo", in Studies in the Law of Succession in Nigeria, edit. by J.D.M. Derrett, op. cit., p. 39; cf. the position in a small dowry marriage, see Kay Williamson, "Changes in the Marriage System of the Okrika Ijo" [Ijaw] 1962, 32 Africa, pp. 53-60 at p. 56.

2. See generally, Elias, The Nigerian Legal System, op. cit. p. 295, Partridge, Cross River Natives, op. cit., p. 255; Ward, op. cit. p. 38; Mockler-Ferryman, op.cit., p. 37; but see Thomas, Antrhopological Report on the Ibo-Speaking Peoples, Part I., op. cit., p. 64 "If she is the first wife, husband and wife live in one house; if there is already a wife, the husband usually sends her to live with the first wife"; Forde, Yako Studies, op.cit., p. 90.

living together is possible.[1] Undoubtedly, the spouses have a legal duty to live together. For example, Egharevba says of Benin customary law:

> "It is contrary to Benin laws and customs for husband and wife to live separately from each other except in the time of sickness, disagreement or during the period of female treatment by the wife or nursing of a child. She should not be allowed a refuge or abode in any other house than those of her parents."[2]

In traditional society a husband and wife living in their separate houses or rooms, but nevertheless forming part of a composite domestic household, are not regarded as living separately, even though they may not be sharing a common roof. The position as stated by Egharevba, obtains among the large majority of patrilineal societies and among almost all matrilinieal societies. To constitute "matrimonial cohabitation", the wife must live in a house or room provided for her use by the husband, and such house or room must form part of his household taken as a whole. It is not necessary for the parties to live under the same roof to constitute matrimonial cohabitation.[3]

To sum up the general position which obtains in most Nigerian societies: a husband has a legal duty to provide accommodation for his wife which makes her a part of his domestic household, even though such accommodation may be separate from his own and exclusive to her use; the wife has a legal duty to live in the accommodation so provided by her husband for as long as she remains his wife.

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1. Cf. W.C. Ekow-Daniels,"Laws Relating to Husband and Wife in Ghana," in Integration of Customary and Modern Legal Systems in Africa, op.cit., p. 368: "In Ghana, consortium does not literally mean the 'right to live together in one household'".

2. Egharevba, Benin Law and Custom, op. cit., p.20.

3. Cf. Egharevba, Benin Law and Custom, Ibid., p.20, "It is contrary to Benin laws and customs for husband and wife to live separately".

The position under Yoruba customary law needs closer examination. In Cole v. Cole,[1] Griffith, J., in trying to explain the differences in the incidents of a statutory marriage and one under Yoruba customary law, stated:

> "By native law a man pays the parent of his wife a certain sum known as dowry, a relic of the times (not so long ago) when a man bought his wife. Having paid for her he naturally owes her less duties than if she brought him a dowry. By native law a man can marry as many wives as he can afford to pay for. The wife does not take her husband's name nor do the husband and wife become one person, but the wife remains a member of her family and often continues to live in her own house apart from the husband... The wife and her children are part of the wife's family".

Ajisafe, however, writing twenty six years later, in 1924, noted:

> "it is repugnant to native law for a woman to live separately from her husband or her husband's family".[2]

Ekundare criticizes Griffith, J.'s statement in Cole v. Cole[3], and he submits that "the learned Judge erred as to the customary law regarding the wife living in her own house". It is the law", he says, "that the wife must live in the matrimonial home or a place which could be regarded as such and provided for her by the husband."[4]

With respect, it is submitted that there is evidence of Yoruba wives living separately and apart from the household of their husbands, in accommodation neither provided nor paid for by the husbands, in some parts of Yorubaland. The position in the indigenous Yoruba society may have been the same as in most other patrilineal societies. The wife lived in her husband's household in his family compound, where

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1. [1898] 1 N.L.R. 15.
2. Ajisafe, Laws and Customs of the Yoruba, op.cit., p.62.
3. [1898] 1 N.L.R. 15.
4. Ekundare, Marriage and Divorce under Yoruba Customary Law, op. cit., p. 22.

she was usually given at least a separate room for her exclusive use. She had a legal right to be given such accommodation and she also had a legal duty to live in the accommodation provided by her husband.[1]

Owing to pressure of accommodation in large urban centres, however, there was a change in the traditional pattern and it became customary for a polygnous husband to provide living accommodation for some of his wives away from his household. He usually visits such a wife or wives from time to time for the purpose of matrimonial intercourse, and the wife may perform certain domestic services for him, such as cooking his food or washing his clothes. In these circumstances, it is not difficult to argue that such accommodation remains a part of the husband's household, even though it may be separated from his main household by considerable distances.

But it is not impossible that under certain circumstances, a wife after marriage may continue to live in her parent's home, and as previously noted, some spouses have never shared a "matrimonial home" in any sense of the term.[2]

Marris, who conducted social research in Lagos around 1960, reported of the households interviewed:

> "Even when there is no question of divorce, husbands and wives may not live together, especially if the husband has several wives. Eleven per cent of the married men were not living with any of their wives, and half the men with several wives lived apart from at least one of them. In all, a quarter of the wives were not living in their husband's household. A third of these were still in Lagos - from lack of space, or because he could not afford to maintain her, the husband had sent his wife to live with his parents or her own family, or rented her a room of her own. Two-thirds lived outside Lagos altogether.[3]

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1. See e.g. Oloko v. Giwa [1939] 15 N.L.R. 31.

2. See further, Chapter VI, p.532.

3. Marris, Family and Social Change in an African City, op.cit., p. 51.

Of the eighty women interviewed by the present writer among the Yorubas, sixteen were not living in the same households as their husbands in the sense that the domestic dwellings were widely separated. All the women living separately from their husbands were living in Ibadan, and in many cases, this may have been due to lack of accommodation. In a few cases, the accommodation was not paid for by the husbands.

With the growing economic independence of Yoruba women, it is now possible for a wife to obtain separate accommodation for herself away from her husband and his other wives, and even away from her own family. She may maintain some marital relationship with her husband. Providing and paying for her own accommodation give her a greater degree of independence and freedom.

There is no evidence that the pattern of separate "far-removed" dwellings of husband and wife, which obtains among some Yoruba married couples exists among other societies. For example, all the women interviewed among the Igbos were living in their husband's houses, and in many cases, they shared the same house with their husbands, although they invariably had their own separate apartment or room.

In rural areas, the traditional pattern of a wife living in a separate house, or in separate rooms in a house apart from her husband or his other wives, remains basically the same. In the urban areas, economic necessity often compels a wife to share a room with her co-wives, or even with her husband. The practice of husband and wife sharing the same room is so foreign to Nigerian custom that among educated Westernized monogamous families, the husband and wife invariably have separate bedrooms. Comparison may be drawn here with the practice in England where a bedroom is usually shared by husband and wife, at least among the middle and lower classes. Poverty may compel a Nigerian family to share the same bedroom, and cases were noted during fieldwork of a man and his wife and children living in one room.

Shields[1] reports a polygynous family in Ogui Urban Area, Enugu, who "lived in one room, the wives taking turns to sleep in the only bed with the man , and invariably when the wives quarrelled each related in detail the performance of the other in bed. Families have no private life".

This case illustrates how unsuitable polygamy is for the average low-income city dweller; unfortunately those who could afford the "luxury" of polygamy often reject it, while those who cannot are sometimes propelled into it.[2]

It should be noted that the duty of a wife to live in accommodation provided by her husband also obtains in most matrilineal societies in Nigeria.[3] There is no evidence that matrilocal marriage, properly so-called, is found in any society in Nigeria. In a few societies, the husband resides with his wife's family for some time, but his residence is never permanent.[4] In many societies, previously mentioned, which operate a double level of dowry payment, where a "small dowry" is paid, the wife has the legal right (which is often exercised) to live with her own family, unless the husband has performed the ceremony of

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1. Nwanganga Shields, Ogui Urban Area: A Social Survey (Economic Development Institute, University of Nigeria, Working Paper, No. 2, 1965), p. 56.

2. As in the case of a member of the Jehovah's Witness who, in spite of his church's bann on the practice of polygamy, and his straitened financial circumstances was forced to fulfil his customary obligation and consequently had to marry two wives, see further, above, Chapter IV, p.325.

3. See Nsugbe, Ohaffia, op.cit., pp. 52-55; Ottenberg, "Inheritance and Succession in Afikpo", op.cit., p.39;

4. See Thomas, who notes that in the Sobo country, there is a curious custom which suggests a transitional form. There are some peoples whose custom requires that a husband should go and reside with his wife's family, i.e. matrilocal marriage. In other cases, the wife goes and resides with the husband, while in still others, the husband resides first with his wife's family, and then removes to his own district. See Thomas, Anthropological Report, Edo-Speaking Peoples, Part 1, op. cit., p. 59.

"buying the mouth" which places an obligation on her to live with the husband at his home and to perform domestic duties for him. If this ceremony is not performed, the husband has a right to her sexual services, but not to matrimonial cohabitation.[1]

(b) The enforcement of matrimonial cohabitation

Although there is a legal duty to cohabit, it will not be physically enforced by the courts at the instance of either husband or wife in today's modern society. There is considerable evidence that in traditional Nigerian society, a woman was often physically forced to cohabit with her husband, and there is no doubt that this may still be the case in certain parts of the country. Usually, the force is used by the wife's family who, for fear that they may have to refund the husband's dowry, often exert pressures, including physical force, to ensure that the wife stays with her husband. Several informants gave instances of women who were bound with ropes, beaten and taken back to their husband's homes by their own families. Some of these cases were fairly recent. The old South African divorce case of Nomatusi v. Nompetu[2] illustrates the plight of women in this respect. The judgment revealed that to gain freedom from her husband the wife fled from one place to the other:

> "She fled to West Pondoland and to every district in East Pondoland in her vain attempts to escape [from] him. Her evidence shows that for three years she had no rest for the soles of her feet in her fruitless endeavours to escape a union which was in every way repulsive to her. Her evidence shows that again and again she was dragged back to the defendant once even at the end of a rope, and that she was on one occasion severely beaten by her brother for refusing the bridegroom whom he and her father had provided for her".

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1. See Bride Price Committee Report, op. cit., pp. 30-37; Williamson, op. cit., p. 56; and further above, Chapter III, p.256.

2. [1915] 3 N.A.C. 165.

The wife in Ogunsanya v. Musliatu Atoke[1] had a more effective way of regaining her freedom. In this Nigerian case, brought before the Customary Court, Abeokuta, the evidence established that the parents of the defendant, realizing that she was planning to elope with another man, decided that she should be taken forcibly to the plaintiff's home. The plaintiff had already paid the dowry and other necessary expenses connected with the marriage. Two men and two women escorted the defendant to the plaintiff's home. The plaintiff disclosed in his evidence that the defendant arrived at his home in a very wild and excited condition, and that "she was armed with dangerous weapons, like blade and pieces of broken bottles". The plaintiff had to run away to avoid any physical injuries, while the defendant escaped from her escorts without spending an hour in the plaintiff's house. The plaintiff had no alternative but to seek the legal remedy of a divorce.

In Nomatusi v. Nompetu[2] the judges held that any customary law which sanctioned such cruel treatment in order to force a wife to cohabit with her husband was 'repugnant and in conflict with all principles of law and humanity". Similarly, the Supreme Court of Nigeria in Egri v. Uperi,[3] which involved a claim for the return of a wife stated:

> "... it is arguable whether any order made by a customary court or by any other court, that a wife should return, against her will, to her husband would not be inconsistent with her freedom of association as guaranteed by the provision of section 26(1) of the Constitution of the Federation. It is also arguable whether such an order would not be contrary to the principles of natural justice equity and good conscience".

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1. [1961] Suit No. B/644/61, unreported, Grade "B.1" Customary Court, Abeokuta, see Ekundare, op.cit., p. 21; see also Akiga, Akiga's Story, op.cit., p. 166; and the Correspondence Relating to the Welfare of Women in Tropical Africa, 1935-37, Cmd. 5784, 1938, p. 32.
2. [1915] 3 N.A.C. 165.
3. [1974] N.M.L.R. 22, at p. 21 [1974] 4 E.C.S.L.R. 632, at p. 638.

In view of such strong obiter dicta from the Federal Supreme Court, it is doubtful whether a wife could be physically compelled to cohabit with her husband, whatever the customary law may have been in the past.[1] In 1852, the English Court of Queen's Bench held that they would not force a wife to return to her husband against her will by enabling him to obtain custody of her by habeas corpus.[2] In R. v. Jackson,[3] the wife refused to live with her husband. He seized her on her way from church, confined her to his house, and prevented her from returning to her relatives. Lord Halsbury and Lord Esher refused to follow the old English case of Re Cockrane,[4] and they held that no English subject had a right to imprison another English subject, whether his wife or anyone else "of full age and sui juris." Similarly, in R v. Reid,[5] the English Court of Appeal held that a husband who steals, carries away, or secretes his wife against her will is guilty of the common law offence of kidnapping her. As Cairns, L.J., said in delivering the judgment of the court:

> "The notion that a husband can, without incurring punishment, treat his wife, whether she be a separated wife or otherwise, with any kind of hostile force is obsolete."

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1. See J.N.D. Anderson, Islamic Law in Africa (London: Frank Cass and Co. Ltd., New Imp., 1970), p. 206; but see Bukar Fantami v. Fanta Dambu [1977] Appeal No. S.C.A/CV/27/B.O./76, unreported decision of the Sharia Court of Appeal, Bornu State, Nigeria, where a wife was ordered to cohabit with her husband', see further,- Chapter IX, below, p. 99. see also Begho, op. cit., p. 52-53.
2. R. v. Leggatt [1852] 18 Q.B. 781.
3. [1891] 1 Q.B. 671, at p. 683.
4. [1840] 8 Dowl. 630.
5. [1972] 2 All. E.R. 1350, C.A.; [1973] Q.B. 299.

The right of a husband to physically force his wife to cohabit with him must now be regarded as obsolete in Nigeria.

(ii) Domestic duties

In every society, a wife has certain domestic and other duties to perform. For example, in a typical English family, the wife will usually be primarily responsible for the running of the "matrimonial home", a duty which may take the form of management of a large domestic staff, or may involve the performance of the household chores, such as cooking, cleaning, mending and looking after the welfare of her husband and children. If the wife has paid employment, some of the domestic duties may be shared by her husband.

The Nigerian wife also has a number of domestic and other duties which may include a duty

(a) to cook food for her husband. In a polygynous family this duty is usually shared by an agreed rota, each wife undertaking to cook for her husband for a week, during which time she also shares his bed. In some families, it is the duty of the youngest wife, (with reference to her date of marriage, and not to her age)[1] to do all the cooking and other domestic chores for the husband;

(b) to help her husband with his farm work; weeding and planting minor crops such as corn beans, nuts, etc.;

(c) to keep the husband's apartment clean and tidy, and to keep the general premises neat and clean;

(d) to wash her husband's clothes, and to do necessary repairs on them;

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1. See Talbot, Tribes of the Niger Delta, op. cit., pp. 205, et. al. Leith-Ross, African Women, op. cit., pp. 199-200; Ajisafe, Laws and Customs of the Yorubas, op.cit., p. 62.

(e) to provide water for the husband's use, especially water for bathing. Water is usually fetched from considerable distances and fetching of water is mainly the work of women and children;

(f) to look after the husband's children which may include, not only her own children, but the children of a co-wife who, for some reason, is unable to look after her own children;

(g) to entertain her husband's friends and relatives, this is usually the duty of the senior wife, but each wife may be asked to contribute labour, or food;

(h) to take care of her husband in illness and old age;

(i) to perform the necessary mourning ceremonies for her husband if he predeceases her; this is one of her most important functions, and for this reason, a man will make as sure as possible that he has a wife who will remain to mourn for him, even if it means marrying at a very old age, or at the point of death.[1]

The husband has few domestic duties. In some communities he has a duty to do the heavy work on his wife's farm, such as clearing the bush or ploughing the land. He also has a duty to repair his wife's house when necessary. He performs a short period of mourning if his wife dies before him, and he has a duty to bury her in some societies.[2]

Whether the wife has paid employment or not, the average Nigerian husband considers it infradig to perform such domestic chores as cooking, sweeping, or washing his own clothes, even among the most Westernized families.

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1. See further Chapter VIII, pp.690-694 ; and see Customary Law Manual, op.cit., p. 276; Basden, Niger Ibos, op. cit., p. 270 et. al.

2. For the matrimonial rights and duties of the spouses of a customary marriage see generally, Customary Law Manual, op.cit., pp. 272-277; Ajisafe, op. cit., p.62, Talbot, Tribes of the Niger Delta, op. cit., pp. 205 et. al; Fadipe, The Sociology of the Yoruba, op. cit. p. 149.

(b) The enforcement of domestic duties

A husband may compel his wife to perform her domestic duties by reasonable chastisement, in traditional societies. The most effective method, however, is to appeal to the umuada (wives of the family), who may persuade the wife to perform her duties. If there is a serious breach, the wife may be fined a goat or a chicken or two. Alternatively, the husband may appeal directly to the wife's own family, who may be successful in compelling her to perform her domestic duties. If the breaches are serious enough, the husband may be justified in divorcing his wife if she refuses to mend her ways. Similar remedies are available to a wife whose husband fails to perform any recognized domestic duty, except that she has no right of physical chastisement in relation to her husband.

(iii) Right of a wife to use her husband's name.

It is very unusual for a wife in traditional society to use the name of her husband, and in some circumstances it can be quite absurd. For example, amongst the Yorubas, a child may be "born with a name", that is, the peculiar circumstance of its birth may be expressed by a name which is applicable to all children born under like circumstances. Thus, in the case of twins, the first born child of either sex may be called Taiwo or Ebo, the shortened form of To-aiye-wo (have the first taste of the world).[1] The second born of the twins is called Kehinde (he who lags behind); while the child born after the birth of twins is called Idowu, whether male or female. Special names are also given to children born in other circumstances, for example, a child born when its mother is on a journey, or away from home is called Abiona, and a posthumous child is given the name of Babarimisa.

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1. The first born twin child is considered to be the youngest, because according to Johnson, he is sent forward to announce the coming of the later born twin, see Johnson, History of the Yorubas, op. cit., p. 80.

Children not born with a given name, are named from circumstances connected with the child itself or with reference to the family fortunes at the time of the child's birth. For example, among the Igbos, a couple who have waited several years for a child may name it Ife-yi-nwa (there is nothing like a child).

Children generally had no surnames, and the prefixes Mr. and Mrs. were unknown. Most families had a totem denoting the family origin, and this was often added to the name of a child, for example, Erin the elephant is said to be the original line of the Kings. A child born to this royal family would have Erin attached to its other names, and his family could be traced from it. Johnson notes that "a married woman cannot adopt her husband's totem much less his name", and that intermarriage within the same totem was originally not allowed as coming within the degree of consanguinity. Children usually take their father's totem, but an illegitimate child who is not acknowledged by his father takes the totem of its mother.[1]

With the coming of the Europeans, especially the Missionaries, many of the indigenous names were abolished or used as surnames. For example, the first born of twins who was named Taiwo would be given an English name and become James Taiwo. His wife may be called Mrs. Taiwo, even though she was not twin born, and in some cases even the husband may not have been twin-born, since with the advent of the Missionaries the system of names giving were corrupted in several ways.

The pertinent point to note here, however, is that originally, a wife never adopted her husband's name on marriage, and the prefix Mrs. was unknown. Women who became Christians and were married under the Nigerian Marriage Act or other statutes were first referred to as "Mrs" followed by their husbands' surnames. This became a mark of prestige and the envy of other women who were married under customary law only.

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1. For the giving, and significance, of names, see generally Johnson, History of the Yorubas, op. cit., pp. 79-89; Thomas, Edo-Speaking Peoples, Part 1, op. cit., pp. 61-62; Meek, Law and Authority in a Nigerian Tribe, op. cit., pp. 295-297; Basden, Niger Ibos, op. cit., pp. 174-175.

In the modern society, quite a few women, especially among the Igbos, use their husbands' surnames, whether they are married under customary law or not, and among educated Igbos, the use of the husband's surname may be regarded as the general custom. Among other peoples, for example the Yorubas, educated women generally use their husbands' surnames, but most of the other women retain their own names. For example, in only twenty, of more than a thousand matrimonial cases examined at Ibadan Customary Courts were the surnames of the husbands and wives identical.

The popular method whereby a woman married under customary law changes her name on marriage is to place an advertisement to that effect in one or more of the local newspapers. For example, of sixty-four "changes of names" advertised in the "Daily Star" (a local paper published at Enugu) of 14 September, 1977, thirty persons changed their surnames, and the prefix "Miss" to "Mrs", seven changed from Miss to Miss, with only a change of surname, one Mrs. to Mrs. with a change of surname, and two from Mrs. to Miss with a change of surname. The others were men. Judging from these newspapers advertisements, changes of names are quite frequent in Nigeria, especially among women, who use the advertisements as marriage certificates.

(iv) Matrimonial intercourse

Matrimonial intercourse is distinguished from matrimonial cohabitation. The latter signifies living together as husband and wife (with or without sexual intercourse between the spouses), while the former may take place even though the spouses are not living together as husband and wife. Normally, however, both are coexistent, and each is a constituent of consortium.[1] Under the general

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1. See National Insurance Commissioner's Decisions, R(G) 5/68 where a woman C lived in the flat of Mr. D, for some years, adopted D's surname and was known as Mrs. D. Allegedly there was no sexual relationship between C and D, and the latter, whose work involved travelling, was only in the flat at weekends. Held, the relationship constituted cohabitation, and that proof of sexual relations is not an essential element of cohabitation, see M.D.A. Freeman, Cracknell's Law Students Companion, Family Law 2nd edition (London:Butterworths, 1976), p. 89, Case No. 335.

law, each spouse owes the other a duty to consummate the marriage and, (with certain exceptions), the incapacity of either, or the wilful refusal of the respondent to do so, will entitle the petitioner to a decree of nullity.[1] This mutual right to sexual intercourse continues after the marriage has been consummated, provided it is reasonably exercised; one spouse is not legally bound to submit to the sexual demands of the other, if such demands are unreasonable, inordinate or perverted.[2] The right to have sexual intercourse is exclusive in the case of either spouse to the marriage.

Under the old English common law, by the act of marriage, a wife consents to intercourse with her husband, and thus confers on him a privilege which she is not entitled to withdraw at will.[3] The general rule therefore was that a husband could not be guilty as a principal, of rape on his own wife.[4] A series of cases[5] have attempted to limit the common law rule, and to bring it into line with modern

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1. See Matrimonial Causes Act, 1973, S. 12(a), 12(b); and further, below, Chapter XI, pp.260-265.

2. See Holborn v. Holborn [1947] 1 All E.R. 32; husband over-sexed; demanded sexual intercourse with the wife at all times of the day and night, and made revolting suggestions to her when she was reluctant to have sexual intercourse in the normal way. The wife's health suffered and she eventually left. Held, the husband's conduct was sufficiently grave and weighty to justify withdrawal from cohabitation, see also Foster v. Foster [1921] p. 438, C.A.

3. Hale's Pleas of the Crown, Vol. 1, p. 629 as cited in R. v. Clarence [1889] 22 Q.BD. 23; R. v. Clarke [1949] 2 All E.R. 448; cf. Stephen's Digest of Criminal Law, 1877, p. 172.

4. R. v. Miller [1954] 2 ALL E.R. 529; [1954] 2 Q.B. 282.

5. See R. v. O'Brien [1974] 3 ALL E.R. 663; a husband could be guilty of rape if a decree nisi had been obtained; he may also be guilty of aiding and abetting the commission of a rape - see Lord Audley's Case [1631] 3 St. Tr. 401, H.L.; R. v. Leak [1975] 2 All E.R. 1059, C.A.

public sentiment which would abhor the idea of a man being legally allowed to use force to compel an unwilling wife to have sexual intercourse with him. In R. v. Reid,[1] the Court, following R. v. Jackson,[2] held that a husband cannot insist upon his right to have sexual intercourse by force, and that he could, in the circumstances, be convicted of an assault on his wife, even though he used no more force than was necessary to effect his aims.

There are several points of differences and similarities between the rights and duties of the spouses of a marriage under the general law as described above, and the spouses of a customary marriage, with reference to sexual intercourse.

(a) Under customary law, both spouses have a legal duty to consummate the marriage, and to satisfy the reasonable sexual demands of the other spouse during the marriage. Incapacity or wilful refusal of either spouse to consummate the marriage, or to satisfy the reasonable demands of the other spouse, entitles the other spouse to a divorce under most systems of customary law. In addition, under traditional customary law, the husband had the right to use reasonable force to compel his wife to submit to his reasonable sexual demands, and a wife who complained that her husband had raped her under normal circumstances, would receive scant sympathy.[3] In this respect, the position under customary law is the same as it was under the old common law. A husband cannot be guilty of rape on his own wife.

Customary law in this respect has been changed by the Criminal Code Act[4], and the Penal Code Law[5] in the

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1. [1972] 2 All E.R. 1350, C.A.; [1973] Q.B. 299, 302.
2. [1891], 1 Q.B. 671, C.A.
3. Ellis, The Yoruba-Speaking Peoples, op. cit., p. 182.
4. 1916, Cap. 42, Laws of the Federation of Nigeria, 1958 Revision Ss. 6 and 357.
5. Cap. 89, Laws of Northern Nigeria, 1963 Revision, Ss. 264-265; and S. 268, "Whoever assaults or uses criminal force to any woman intending to outrage or knowing that he will thereby outrage her modesty, shall be punished with imprisonment for a term which may be extend to three years or with fine or both".

Southern and Northern States of Nigeria respectively. Under the Criminal Code Act, regardless of the type of marriage contracted,[1] a husband cannot be guilty of rape on his own wife as a principal,[2] although he may be convicted as an accessory.[3] A husband is not entitled to use force or violence for the purpose of exercising his right to intercourse, and if he does so, he may be guilty of wounding,[4] doing grievous harm,[5] indecent assault,[6] or assault[7] according to the circumstances.

In Alawusa v. Odusote,[8] the accused shaved the pubic hair of his wife married to him under customary law. He was convicted of indecent assault on a female. On appeal to Lagos High Court, the Judges, Butler Lloyd, acting C.J., Brook, J., and Jeffreys, J., held that a husband could be convicted of a rape upon his wife as an accessory

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1. See s. 6 of the Criminal Code Act. The reference to husband and wife is not restricted to the parties to a Christian marriage contract, ss. 10, 33, 34, and 36 of the Criminal Code Act.

2. See ss. 6 and 357 of Criminal Code Law; Alawusa v. Odusote [1941] 7 W.A.C.A. 140; of State v Ward [1944] 28 S.E. 2d. 785.

3. Criminal Code Act, s. 7; cf. Penal Code Law, s. 282.

4. Ibid., ss. 322 and 338.

5. Ibid., s. 335.

6. Ibid., s. 351.

7. Ibid., s. 351.

8. [1941] 7 W.A.C.A. 140 at p. 141.

and that he could also be convicted of indecent assault upon her. They stated, however, that "Indecent assault is not a lesser form of rape. An assault upon a wife is not rendered indecent by circumstances which would render it indecent in the case of another woman". The judges were of the opinion that

> "In the present case the appellant undoubtedly committed an assault the enormity of which a very short acquaintance with native ideas will suffice to make apparent, but we do not think that as between husband and wife it could properly be characterised as indecent".[1]

The appeal court substituted a conviction for common assault, contrary to section 351 of the Criminal Code Act. The accused was sentenced to six weeks imprisonment with hard labour. It may be noted that although the accused in Alawusa v. Odusote,[2] was found not guilty of indecent assault, a husband may be found guilty of an indecent assault upon his wife under certain circumstances. What is "indecent" in the particular circumstances is a question of fact.[3]

(b) Under the common law, the right to have sexual intercourse is exclusive in the case of either spouse to the marriage. Under most systems of customary law, a husband has an exclusive right to the sexual services of his wife.

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1. Among many Nigerian communities, much pubic hair is considered a matter of pride, as it is thought that men prefer women with a lot of pubic hair. It is alleged that a woman's pubic hair will not grow if she has too frequent sexual intercourse, and consequently, to abuse a woman about her lack of pubic hair is a serious offence. To shave a woman's pubic hair is considered a grave offence, see Green, Igbo Village Affairs, op. cit., p. 202.
2. [1941] 7 W.A.C.A. 140.
3. See generally, Lionel Brett and Ian McLean, The Criminal Law and Procedure of Lagos, Eastern Nigeria and Western Nigeria (London: Sweet and Maxwell, 1963), pp. 73--732 par. 1960-1961.

A married woman, however, under the customary laws of most communities in Nigeria has no corresponding exclusive right to her husband's sexuality.[1] Not only must she share him with the other wives in a polygamous marriage, but the wives, individually or collectively, have no legal right to restrict their husband's access to other women.[2] This is a glaring instance of discrimination against women, which still persists in modern customary law, and which offends against the fundamental rights under the Constitution of the Federal Republic of Nigeria, 1979. This discrimination will be discussed further in relation to adultery.

Because of the importance attached to procreation, customary law gives a wife the right to have reasonable opportunities for sexual intercourse with her husband. Refusal by, or incapacity of, a husband to satisfy the reasonable demands of his wife in this respect justifies a divorce by the wife.[3]

(v) Mutual marital confidences and the law of evidence

It is a fundamental principle that in any legal proceedings, civil or criminal, no relevant evidence which will help the court to ascertain the truth should be excluded. The intimate and confidential nature of the marital relationship, and the need that the law should protect marital

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1. See Begho, Law and Culture, op. cit., p. 51; cf. Ekow-Daniels, "Laws Relating to Husband and Wife in Ghana", op. cit., p. 369.

2. Begho, op. cit., p. 51; Forde, Yako Studies, op. cit., p. 127.

3. See Ward, Marriage Among the Yoruba, op. cit., "the boy and girl must have sexual intercourse a few times before consent for hearing [to a marriage proposal] is given. Sometimes it is the girl herself who insists on this, in order to make the man who wishes to take her in marriage prove his manhood".

confidence is also important.[1] In some cases, the two principles of public policy may conflict. For example, to force the spouse of an accused person to reveal the confession of guilt made to him or her by the accused spouse would ultimately destroy the confidential nature of the marital relationship. On the other hand, the confession of an accused person to his or her spouse may be the only evidence available to the prosecution to prove the guilt.[2]

Under the English common law certain rules were devised which attempted to effect a compromise between these two rules of public policy. In civil proceedings, neither the parties nor their spouses were competent witnesses, and in criminal cases, with a few exceptions, the spouse of the accused was equally incompetent.[3] These principles of common law, as amended by statute,[4] have been received in Nigeria, and apply to a statutory marriage by virtue of the provisions of the Nigerian Evidence Act. Although most of the principles of common law in this respect have been gradually eroded by statute, and in civil proceedings the principle that relevant evidence should not be excluded has completely ousted the principle that marital confidences should be protected in modern English law,[5] Nigerian law in this respect remains relatively the same and applies to the spouses of a marriage under the Nigerian Marriage Act.[6]

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1. See Argyll v. Argyll [1965] 1 ALL E.R. 611, 619; [1967] Ch. 302, 322.

2. See Rumping v. Director of Public Prosecutions [1964] A.C. 8154 H.L. per Lord Morris: Respect is due to the confidences of married life: but so is respect due to the ascertainment of the truth. Marital accord is to be preserved: but so is public security... Public policy and public safety would alike require that vital evidence should not be withheld.

3. See Bromley, Family Law, op.cit., pp. 117-118.

4. See e.g. Evidence Act, 1851, 12 Stats, 815, s.1; and Evidence Amendment Act, 1853, 12 Stats; 822.s.3; "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage"; Criminal Evidence Act, 1898.

5. See Civil Evidence Act, 1968, 12 Stats., 910, s. 14, 16(3).

6. See Evidence Act, s. 2.

Under customary law, however, spouses are compellable and competent to give evidence in cases where the other spouse is a party. In civil and criminal cases heard in Customary Courts, the common law rules do not apply, neither does the Nigerian Evidence Act which has altered the common law rules to some extent, and which is applied in cases heard in the Superior Courts. Under the Evidence Act, a spouse of a customary marriage is a competent and compellable witness. Section 161 provides:

> "When a person charged with an offence is married to another person by a marriage other than a monogamous marriage such last named person shall be a competent and compellable witness on behalf of either the prosecution or the defence: Provided that in the case of a marriage by Mohammedan law neither party to such marriage shall be compellable to disclose any communication made to him or her by the other party during such marriage".[1]

This provision has been criticized as discriminatory against the spouses of a customary marriage[2] and is discussed further when dealing with statutory marriages.[3]

3. REMEDIES AVAILABLE FOR BREACHES OF CONJUGAL RIGHTS

Remedies for interference with consortium by third parties

Interference with consortium may take the form of

(1) adultery - the impairment of the husband's (and in a few societies, the wife's), exclusive right of sexual intercourse;

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1. Ibid., s. 161; see also ss. 157 and 162.
2. But see Faremilekun and Ors. v. The State [1974] 3 W.S.C.A. 86, where it was held that the disabilities under s. 161 of the Evidence Act are not against any citizen of Nigeria of a particular community, tribe, place of origin, religion or political opinion.
3. See below, Chapter XI, pp. 215-218.

(ii) enticement;

(iii) seduction - total interruption of consortium, depriving the husband, not only of the sexual services of the wife, but of the domestic, economic and other services habitually rendered by the wife.

(iv) harbouring of a wife - usually done by her parents or other relatives, and resulting in total interruption of consortium.

Legal remedies for these breaches of consortium will be examined in order to see how far they discriminate against, or in favour of women.

A. Adultery

(1) Definition of adultery: Adultery in English law usually means voluntary sexual intercourse of a married person with a person other than his or her spouse.[1] In traditional customary law, there need not be evidence of actual sexual intercourse for a wife to be guilty of adultery. Certain acts which are repugnant to customary law, as leading to the act of adultery, were treated as adultery, and were punishable by fine or otherwise. For example, an indication of what constituted adultery in traditional societies is given by Kingsley: "the adultery itself is often only a matter of laying your hand, even in self-defence... on a woman - or brushing against her in the path".[2] Mary Slessor tells the story of two young wives of a famous Calabar chief who had left the women's yard and entered one where a boy was sleeping. This action was counted as adulterous, and the wives together with two young girls who had known of the incident, but had failed to

1. See Denis v. Denis [1955] 2 ALL E.R. 727, C.A.; [1955] p. 153. Clarkson v. Clarkson [1930] 143 L.T. 755 and further, Chapter XI, pp. 265-266.
2. Kingsley, Travels in West Africa, op.cit., p. 350; see also Phillips, Survey of African Marriage, op. cit. p. 413, for the viewpoint expressed in the Report of a Missionary Conference (Protestant) at Calabar, 1911, that failure to recognize such acts as adultery by the Nigerian Marriage Act was harmful as it tended to lower the moral tone; cf. Nyendael, quoted by Roth in Great Benin, op. cit., p. 39; the husband has to surprise the wife "in the fact, without which evidence he cannot punish her".

report it, were condemned by the chief and his councillors to one hundred strokes each.[1]

The Efik Marriage Law, drawn up by the Efik National Society, and printed for private circulation only in 1905, as amended in 1918,[2] makes a distinction between sexual adultery and non-sexual adultery. Non-sexual adultery is defined as follows.

> "1. Playing, through love, with another man's wife.
> 2. Keeping secret friendship with another man's wife.
> 3. In the way of love, giving another man's wife any cash or present.
> 4. In the way of love, touching another man's wife in any part of her body, such as shaking hands or touching the breast etc."

Actions which, in traditional law would have constituted adultery, would not be considered as such under modern customary law which tend to regard as adultery, only unlawful sexual intercourse. For example, in Atansuyi v. Gbadamosi[3], the husband sued in Ikare Customary Court for damages for adultery and seduction. The evidence showed that the plaintiff's wife was found on several occasions in the house in which the defendant lived, and that she had left the plaintiff's home with the intention to divorce him. There was further evidence that the defendant was the man she intended to marry if her petition for divorce was granted, and that the defendant was financing the divorce action. The President of the Customary Court found for the plaintiff and awarded the £100 damages claimed against

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1. See Livingstone, Mary Slessor of Calabar, op. cit., pp. 41-42; Mary Slessor succeeded in getting the punishment reduced to the infliction of ten stripes; cf. Ekundare, Marriage and Divorce under Yoruba Customary Law, op. cit., p. 33; "Indecent familiarities and caresses alone are sometimes sufficient for alleging adultery."
2. A copy of these rules, was given to the present writer by the President of Calabar Customary Court, Chief O.E. Adim; grateful thanks are hereby recorded.
3. [1969] 2 ALL N.L.R. 222.

the defendant. The defendant appealed to the High Court of the Western State on the ground, inter alia, that the lower court erred in law and in fact in finding for the plaintiff when the adultery complained of was not proved beyond reasonable doubt. Odumosu, J., defined adultery as "consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage". He held that the standard of proof in all adultery cases is the same, and that apart from association coupled with opportunity there must be evidence of illicit affection or familiarity before adultery can be inferred. Under the circumstances it could not be said that the presence of the plaintiff's wife in the defendant's house had no other objective than that of illicit sexual intercourse.

This decision evidences a decided shift from what constitutes adultery in traditional society.

(ii) Liability for adultery:

Almost all systems of customary law recognize sexual intercourse with a man's wife without his consent, or the consent of his family in some communities, as a personal wrong done to him, entitling him to redress from the wrong-doer.[1] In very few societies, is adultery with a woman's husband regarded as a wrong done to her, and even where it is recognized, the only redress available to her in most cases is divorce. Allott sums up the general position in customary law:

> "In customary law everywhere in Africa a man's adulterous connection (or even suspect behaviour) with a married woman is an actionable wrong, usually sounding in damages. A wife does not have a similar action in adultery if her husband

1. See Basden, Niger Ibos, op.cit., pp 233-4; Talbot, Tribes of the Niger Delta, op. cit., pp. 199-203; Peoples of Southern Nigeria, op. cit. Vol. III, pp. 629 et. al.; Forde, Marriage Among the Yako, op. cit., p. 102; Roth, Great Benin, op. cit., p. 39; Thomas, Anthropological Report on the Ibo-Speaking Peoples, op. cit., pp. 59-60, 75 et. al.

> indulges in illicit relations with a woman other than one of his wives - there is thus a double standard of behaviour, even in Africa".[1]

(iii) Punishment for adultery:

So jealously do men protect their exclusive rights to their wives' sexuality that in most systems of customary law, adultery was often punished by the death of the male adulterer, and in nearly all systems, it provided a ground for divorce by the husband.[2] Among the Yorubas, Talbot notes that "a chief's wife could be punished with death for adultery, but the usual procedure was for the husband to claim heavy damages before the chief of the "quarter".[3] If the husband divorced his wife for this cause he was entitled to the return of his dowry.[4] Mockler-Ferryman noted that Ibo laws were few at the end of the last century, but infringement was rigorously punished:

> "For adultery a heavy fine is levied on the man, though generally the outraged husband demands satisfaction at the point of the spear. Should a chief's wife be deemed guilty, both she and her paramour are required to drink sassa-water to satisfy the honour of the chief".[5]

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1. A. N. Allott, Essays in African Law, (Westport, Connecticut Greenwood Press, 1975), p. 220; Begho, op.cit., p. 51, Aniagolu, op.cit., p. 109; Aguda, Select Law Lectures and Papers, op. cit., p. 75.
2. In most systems of customary law adultery was formerly treated as a crime, see Aguda, Select Law Lectures and Papers, op. cit., p. 73; Thomas, Anthropological Report ... Ibo-Speaking Peoples, Part IV, op. cit., p. 75; Begho, op. cit., p. 51; Meek, Northern Tribes of Nigeria, op. cit., Vol. I, p. 275; Basden, Niger Ibos, op. cit., p. 233; Meek, Sudanese Kingdom, op. cit., p. 389, see also R. v. Ottio Enwa [1943] 9 W.A.C.A.
3. Talbot, The Peoples of Southern Nigeria, op. cit., p. 635; cf. Thomas, Anthropological Report ... Ibo-Speaking Peoples, Part IV, op. cit., p. 76; "The punishment for adultery on the part of a married woman depends on the status of her husband".
4. Ellis, Yoruba-Speaking Peoples, op. cit., p. 186; cf. the position among the Romans, see Corbett, op. cit., p. 41.
5. Mockler-Ferryman, Up the Niger, op. cit., p. 33.

Kingsley confirmed this statement as applied to the whole of West Africa: "The laws against adultery are theoretically, exceedingly severe. The punishment is death and this is sometimes carried out." She describes the ordeals a chief's wife accused of adultery had to undergo. One ordeal most frequently employed was for the accused wife to put her finger into a pot of boiling palm-oil, after which the finger was dipped into water. If blisters appeared the next day, as a result of this treatment, the accused wife was adjudged guilty and punished. In order to escape this horrible ordeal, the wife often testified falsely. The writer concludes:

> "These accusations of adultery are next to witchcraft, the great social danger to the West Coast Native and they are often made merely from motives of extortion or spite and without an atom of truth in them".[1]

The severity of the punishment for adultery in traditional society among the Ibibios was narrated by an aged informant in Eket. She noted that adultery is much more frequent in Eket today than it was when she was a young girl nearly one hundred years ago. She attributed the increase to the severity of the punishment adultery attracted, at least for the male offender, in those days. He was often strung up on a tree and a sharp spear thrust through his body. After mutilation of his private parts, his body was left there until it rotted, or was eaten by crows, as a deterrent to others.[2]

This information was confirmed by other informants in Eket who stated that usually adulterous wives were not killed, but merely beaten, made to perform certain sacrifices, and to give specified items, such as a fowls, kola-nuts, or goats, to appease the husband's ancestors.[3]

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1. Kingsley, Travels in West Africa, op.cit., p. 350; see also Egharevba, op. cit., p. 18; Thomas, Anthropological Report ... Ibo-Speaking Peoples, Part IV, op. cit., p. 75; Begho, op. cit., pp. 60 and 105.
2. See also Talbot, Peoples of Southern Nigeria, op. cit., p. 664.
3. See also Talbot, Woman Mysteries... op. cit., p. 97; Basden, Niger Ibos, op.cit., p. 233; cf. the position among the early Germans where an adulterous woman was dragged through the village until she died, see Goodsell, op. cit., p. 210,

The impression should not be created that adultery did not exist. It did, and was tolerated if not actively encouraged, in many societies.[1] For example, another old Eket informant, when asked how the several wives of a polygynist were able to satisfy their natural sexual urges stated that the husband usually had one wife "whom he always kept before his eyes" (i.e. he loved and agreed with well). The other wives were tacitly allowed to have paramours, and the husband "would not bother with them much", although he claimed all the children produced as a result of their illicit unions. She also explained that this practice enabled men who were too poor to marry to have sexual relations.

Uchendu reports that among Ngwa Igbo, a woman can get the husband to share his 'exclusive sexual right' with a paramour chosen by the bride, and acceptable to the bride-groom[2]. Some systems of customary law, for example, many Igbo communities, allow a married woman to be assigned to another man, usually for the purpose of making her pregnant, where the husband is, or is suspected to be, incapable of procreation. In some communities, such assignments may be done by the husband's family without his knowledge or consent.[3] Theoretically, the wife's consent is necessary for an assignment, but threats of divorce, or other pressures may force an unwilling wife to acce de to such requests. In this respect, it may be noted that the practice whereby "the husband of a woman,

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1. See Basden, Niger Ibos, op. cit., p. 233; Ward is of the opinion that adultery is more common in polygynous unions, see Ward, Marriage Among the Yoruba, op. cit., p. 40.

2. Uchendu, Concubinage Among Ngwa Igbo, op. cit., p. 189.

3. See The Manual of Customary Law, op. cit., p. 272; Basden, Niger Ibos, op. cit., p. 233; Meek, Law and Authority in a Nigerian Tribe, op. cit., p. 276.

his family, or his clan, has the right to transfer her to another person for value received or otherwise " has been condemned as similar to slavery, by the international community.[1] Assignment of a wife, without her consent, for the purpose of procreation, may also be regarded as slavery.

If the husband's or his family's consents express or tacit were not given, adultery by a wife was treated with severity.

(iv) The reasons for harsh penalties for a wife's adultery

Several reasons have been advanced why a wife's adultery is harshly treated, including the old idea that a wife is regarded as the property of her husband,[2] and the desire to preserve the morality of the community[3]. The latter reason cannot be defended, since in many cases, a married woman was permitted to have sexual relations with men other than her husband.[4] Adultery has a deeper connotation, and in many societies it was, and still is regarded as a sin which had to be purged by sacrifices. As it is believed that adultery results in various evils for the husband, and

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1. See the Supplementary Convention on the Abolition of the Slave Trade and Institutions and Practices Similar to Slavery, 1956, which had sixty-seven States Parties as of 30 Sept. 1966. "Institutions and practices similar to slavery which specially affect women have been found to persist in some countries despite the efforts of the Governments concerned to suppress them". See the United Nations Assistance for the Advancement of Women, E/CN.6/467, 1966, p. 14.

2. See further, Chapter XIII, pp. 435-438.

3. According to the Emperor Constantine, severity of punishment for adultery was designed to make the relatively decent woman more resistant to temptation, see Corbett, The Roman Law of Marriage, op. cit., p. 141 .

4. See below, Chapter VIII, p.639; see further, Bradbury and Lloyd, The Benin Kingdom, op. cit., p. 108; Forde and Jones, The Ibo and Ibibio-Speaking Peoples, op. cit., p. 18.

sometimes even for the wife,[1] various measures are adopted to avert these consequences. For example, in Abakaliki and Izzi Divisions in Anambra State corporal punishment by her natal family is meted out to an adulterous wife. This is followed by ikpofu ekwu, a ceremony by which the husband's ancestors are appeased.

This practice gave rise to unfortunate results in at least one recorded case in Izzi Division. In the State v. Nwaelem Nweri and Ors,[2] a case decided in 1975, at the Abakaliki High Court, the deceased who complained of heart pains, confessed her adultery to her husband. Her husband sent for the first accused, the deceased's brother, and told him of the adultery which they believed had brought the illness on her. It was decided to carry out the custom. They tied her hands with bicycle tubes, and her legs with rope, while four men beat her. Her daughter gave evidence that the beating started when she was on her way to school (at about 8 a.m.) and was still in progress when she returned from school at noon. They left the

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1. For e.g. Talbot notes that it is believed amongst nearly all ethnic groups in Southern Nigeria that if a wife commits adultery while her husband's food is being cooked, the husband will probably die. A woman who does not confess to such a sin before giving birth will endanger both her own, and her offspring's life, see Talbot, Peoples of Southern Nigeria, op. cit. p. 712; Talbot, Tribes of the Niger Delta, op. cit. pp. 206, 213; among Northern Ngwas (Igbo) the wife, holding a fowl, had to confess before the umuada after which the fowl was killed and the blood sprinkled on the shrine to wash away the "sins" - see J.C.J. Eluwa, Inter-Group Relations of Northern Ngwa Before the Colonial Era, M.A. dissertation, University of Nigeria, 1975, p. 30; see also Thomas, Anthropological Report ... Ibo-Speaking Peoples, op. cit., Part IV, pp. 67-69.

2. [1975] Charge No. AB/3/C/74, unreported, Abakaliki High Court, 30 June, 1975.

deceased helpless, vomitting, and still tied. She died the same evening. The beating was done in the presence of her husband, but he did not take part.

Witnesses testified that the custom was still in existence and that no other penalty was recognized by custom for adultery. A woman confesses her adultery when she, or one of her children, is sick. No precise number of strokes is prescribed. Another witness stated that the flogging given to the woman was "normal". "I have in the past", he said, "seen such flogging custom performed. The flogging of the deceased was the normal flogging. It is the custom that several people join in flogging the adulteress."

A medical doctor gave evidence to the effect that the beating was not excessive, and could not have caused the death of a healthy woman. He concluded that the deceased must have been very ill at the time of the beating, and but for the beating, may have died later, but the beating hastened her death. The Judge, S. Amadi-Obi, said, inter alia, "There is no evidence that any death has resulted from the performance of this custom hitherto. I therefore find as a fact that that is the custom and belief of the people of Izzi". As to whether the belief was reasonable within section 25 of the Criminal Code, the Judge distinguished explicable belief from inexplicable belief:

> "In the explicable belief there are present facts from which one can forsee the realization of one's belief either (1) concrete facts as for instance that mixture of two atoms of hydrogen and one atom of oxygen will always result in water, or facts of history, or existence, as for example, that Julius Caesar lived or that the planet of Mars exists and (2) statistical facts as in the instant case.
> In an inexplicable belief one attached no reason to it. It is said to be a take it or leave it belief. It is in some cases described as superstitious, as a belief in witchcraft.
> It is my view that explicable belief is reasonable and an inexplicable belief is unreasonable."

The Judge concluded:

> "In the instant case this custom has been observed with good results in the past. Past statistics have shown that the custom has been efficacious to cure ailing adulterous woman (sic). This is so far the only known case where it resulted in the death of the recipient. I therefore find that the belief of the accused persons is not unreasonable. I find the accused persons not guilty of murder. Each is discharged and acquitted of murder ... and I am of the view that the first accused flogged the deceased a little more than the other accused persons expected him to do and that this contributed to the death of the deceased."

The first accused was found guilty of manslaughter.

Another reason advanced for the harsh treatment of adultery in most societies is that men consider it a heinous offence to be palmed off with other men's children. Rousseau regards such an offence as the crime of treason.[1] To preserve their property for inheritance by their own blood the argument runs, it is necessary to preserve the wife's chastity. This argument neglects the fact that among most traditional societies in Nigeria women had a degree of sexual freedom. In many societies, the time of sexual licence coincided with the period between puberty and just before they took up permanent residence in their husbands' households.[2] Children begotten by other men during this period brought disgrace in certain societies,[3]

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1. See Rousseau, Emile, op. cit., p. 325.
2. Among the Hausas, this period of sexual licence was known as Tsaranchi, see Meek, Northern Tribes of Nigeria, op. cit., Vol. I, p. 188; see also Partridge, Cross River Natives, op. cit., p. 254; Thomas, Anthropological Report... Ibo-Speaking Peoples, Part IV, op. cit., pp. 69-70; Ward, Marriage among the Yoruba, op. cit., p. 49; Forde, et. al., Peoples of the Niger-Benue Confluence, op. cit., p. 68; Bradbury and Lloyd, The Benin Kingdom, op. cit., p. 154.
3. E.g. among the Hausas, see Meek, Northern Tribes, op.cit. Vol. I, p. 188.

but in others they were simply claimed by the husbands.[1] In Onitsha, the period of sexual freedom for a wife was just before she was taken to her husband's home for permanent residence, and many older informants alleged that if a woman could not show that she had attracted many lovers during this period, she was derided by her husband.[2] In some societies which practised "fattening", other men were allowed access to the girls in the "fattening houses".[3]

Moreover, in matrilineal societies, children do not generally inherit property from their fathers, yet adultery in these societies attracted similar harsh penalties.[4] Schlegel,[5] in a study of sixty-six matrilineal societies, found that almost double the number allow adultery by the husband (60 per cent) as allowed it by the wife (32.1 per cent), in spite of the fact that children resulting from an adulterous union belong to their mother's descent group and are not, therefore, cuckoos in the father's lineal nest. She says:

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1. See Thomas, Anthropological Report of the Ibo-Speaking Peoples, Part I, pp. 68-69.
2. Information given by Chief P.O. Anatogu, the Onuwu of Onitsha in a recorded interview, at Onitsha, 19 July, 1978; see also Henderson, The King in Every Man, op. cit., p. 203.
3. Information collected at Eket and Calabar. This practice also obtained among some Igbo communities.
4. See Forde, Yako Studies, op. cit., p. 126.
5. See Alice Schlegel, Male Dominance and Female Autonomy, (London: Hraf Press, 1972), p. 89.

> "It is hard to explain why wives should be expected to be sexually faithful so much more than husbands. I can think of no biological or psychological reason for this and the usual structural explanation of the child's membership in his father's descent group is not valid for matrilineal societies."

Modern psychologists and psychoanalysts have advanced evidence which validates greater female unfaithfulness,[1] but in spite of this, the law in many societies continues to regard a wife's infidelity more harshly than it does a husband's.[2]

(c) Modern attitude to adultery

In Nigeria, the modern position as regards adultery, although still discriminatory in favour of husbands, is very different from what it was in traditional society. For example:

(a) adultery is not a crime unless specifically defined as such in a written law. Under the Penal Code Law 1960,[3] of Northern Nigeria, adultery (zina) is a criminal offence which may be committed by males,[4] and females,[5] and may involve married or unmarried persons. Under the Criminal

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1. See Masters and Johnson, Human Sexual Response, op. cit.; Masters and Johnson, "Orgasm. Anatomy of the Female" in Encyclopaedia of Sexual Behaviour, edit. by A. Ellis, and A. Abarbanel, (New York, Hawthorn Books, 1961), p. 792; L. J. Ludovici, The Final Inequality: A Critical Assessment of Woman's Role in Society (London: Frederick Muller Ltd. 1965), p. 246; Judd Marmor, "Changing Patterns of Femininity: Psychoanalytic Implications", in The Marriage Relationship: Psychoanalytic Perspectives, edit. by Salo Rosenbaum and Ian Alger (New York: Basic Books Inc. 1968), pp. 31-45 at p. 39.
2. See further, Chapter VIII, pp. 637-638.
3. Cap. 89, Laws of the Northern Region of Nigeria, 1963 Revision.
4. Ibid., s. 387.
5. Ibid., s. 388; any extra-marital intercourse constitutes the offence.

Code Act[1] which operates in the Southern States, adultery is not a crime, and cannot therefore be treated as such in those societies where adultery was a criminal offence under customary law.[2] In Aoko v. Fagbemi,[3] the appellant pleaded guilty to a charge of adultery, in that she lived with another man without judicial separation from her husband. In February 1961, she was sentenced to imprisonment for one month, or a fine of £2.10, by a Grade D. Customary Court. She was also ordered to pay £5 compensation to her husband, and £1.75 in costs.

On appeal, the High Court held, inter alia, that the conviction of the accused violated her rights as guaranteed by section 2(1) of the Constitution of the federation of Nigeria, 1960, which provides that a person shall not be convicted of a criminal offence unless the offence is defined, and the penalty therefor is prescribed in a written law.[4]

(b) the traditional penalties, such as death, ordeals of various kinds, severe beatings, and sale into slavery can no longer be imposed;[5]

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1. Cap. 42, Laws of the Federation of Nigeria, 1963 Revision.

2. Adultery may be made a criminal offence under local bye-laws, see e.g. the Customary Courts Manual of the former Western Region of Nigeria; s. 163, (which provides: "if adultery is a criminal offence under a local council bye-law, a criminal prosecution can be brought. This will be a separate proceeding from the claim for divorce. A conviction for adultery should not be included in the judgment in a divorce action".

3. [1961] 1 ALL N.L.R. 400.

4. See S. 33(12) of the Constitution of the Federal Republic of Nigeria, 1979, No. 25 of 1978.

5. See Ordeal, Witchcraft and Juju Ordinance, 1903, No. 13 of 1903, s. 2, which provides: "Trial by the ordeal of sasswood, esere-bean or other poison, boiling oil, fire, immersion in water or exposure to the attacks of crocodiles, or other wild animals, or by any ordeal which is likely to result in the death or bodily injury to any party to the proceeding shall be and is hereby prohibited". Ten years imprisonment with hard labour was imposed for any infringement, and if death resulted as a result of an infringement of the Ordinance, the penalty on conviction was death.

(c) secret societies, such as egbo among the Ibibios, and egungun among the Yoruba, which were used as instruments to suppress adultery, by driving fear into the hearts of women, are now illegal;[1]

(d) trivial acts which formerly counted as adultery would not now be legally considered as adultery;[2]

(e) the amount of damages obtainable for adultery in a civil suit is fixed by local legislation in some areas.[3]

Although there has been general improvement in the laws relating to adultery, sexual inequality in the application of the law continues to operate. In most communities, a husband of a customary law marriage may claim damages for adultery from the adulterer, from the adulterous wife, or from both of them.[4] A wife is not entitled to claim damages for adultery under customary law in most communities, and this is another example of the infringement of the right to freedom from discrimination entrenched in the Constitution of the Federal Republic of Nigeria, 1979. It may be noted here that a wife of a statutory marriage is entitled to claim damages from anyone who commits adultery with her husband.[5]

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1. See Burns, History of Nigeria, op. cit., pp. 35-36; Clarke, Travels and Explorations in Yorubaland, 1854-1858, op. cit., p. 284; Latham, Old Calabar, 1600-1891, op. cit., pp. 36-38; S.P. 1139/Vol V, Annual Report of the Calabar Province, 1926 - C.S.E. 1/12/2, National Archives, Enugu; see also the treaty signed by the Alake and Chiefs of Abeokuta with Commander Beddingfield and others on 7 Nov. 1861; Burton, Abeokuta and the Cameroon Mountains: An Exploration (London: 186), Vol. II, pp. 5, 7-8.

2. E.g. crossing over the outstretched legs of a wife or touching her waist, see Begho, op. cit., p. 101, cf. Atansuyi v. Gbadamosi [1969] 2 All N.L.R. 222; but see Henderson, The King in Every Man, op. cit., p. 213.

3. See Apon v. Fayemiwo [1969] 1 N.M.L.R., 233; see The Ibadan District Council Marriage Divorce and Custody of Children Bye-Laws, 1965. s.l.

4. See below, Chapter VIII, p.637.

5. See further,below, Chapter XI, p. 279.

Enticement

A breach of the duty of consortium may be occasioned by anyone who wrongfully entices, or procures, or induces a spouse to abandon the duties owed to the other spouse. The latter spouse, as a consequence, can recover damages for enticement resulting in loss of consortium.[1] Enticement is not a customary law remedy, although it is analogous to seduction and harbouring of a wife, which, as shall be seen later, are known to some systems of customary law. Enticement is a common law concept founded in tort, and although it has recently been abolished in English law,[2] the action is still available in Nigerian law.

Since enticement is a tort, actions for enticement may not be brought in a customary court, but it is available to both husband and wife of a customary marriage.[3] In Wagbara v. Wobo,[4] the plaintiff brought an action in the High Court claiming £550 damages against the defendant for the enticement of the plaintiff's wife married to him under customary law. The defendant's Counsel contended that since the marriage on which the action was founded was a customary marriage, the High Court had no jurisdiction; also that an action for enticement was only available to a spouse married under the Marriage Act. The Court held:

> "(1) that the action for enticement was available to the spouses of a customary marriage and was not limited to spouses married under the Marriage Act;

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1. Winsmore v. Greenbank [1745], Welles, 577.
2. See Law Reform (Miscellaneous Provisions) Act, 1970, 35 Stats., 553, s.5(a) and (c) which abolished actions for enticement seduction and harbouring of a spouse; see the Report of the Law Reform Committee, 1963, Cmnd. 2017, p. 23: "The only importance of the action of enticement at the present day is in the field of husband and wife, where we think that on adequate remedy is available in divorce proceedings..."
3. Welton v. Broadhead [1958] The Times, 19 June, 1958.
4. [1970-72] 1 R.S.L.R. 14.

(2) that the High Court had jurisdiction to try the action, since the action was not one to enquire into the validity or otherwise of the marriage as such or for the dissolution of the marriage, but for redress for an injury done to the plaintiff's right of consortium."

Similarly, in Solomon v. Chukwuani,[1] in a claim for enticement of a wife married under customary law, it was held that the action had nothing to do with status, or with the formalities and or incidents of customary law marriage.[2]

A wife, whether of a customary marriage or not, is entitled to sue for enticement. Obi's argument that enticement is not available to women married under customary law,[3] it is respectfully submitted, cannot be supported. In the English case of Newton v. Hardy and Anor,[4] it was held that a married woman has a legal right to the consortium of her husband and can recover damages for enticement from anyone who violates that right. In view of the decisions in Wagbara v. Wobo[5] and Solomon v. Chukwuani,[6] that enticement is a remedy for infringement of a legal right possessed by all husbands and wives under Nigerian Law, it is difficult to see on what basis wives of a customary marriage are excluded.

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1. [1972] 2 E.C.S.L.R. 619.
2. Compare the Ghanian case of Mate v. Amanor [1973] 1 G.L.R. 469, where it was held that a husband's rights and obligations appertaining to marriage contracted under customary law, ought to be distinguished from his legal rights arising out of torts committed in respect of the said marriage.
3. Obi, Modern Family Law, op. cit., pp. 232-233.
4. [1934] 149 L.T.R. 165, 168; [1933] All E.R. 40; see also Gray v. Gee [1923] 39 T.L.R. 429; and obiter dicta in Place v. Searle [1932] 2 K.B. 497; and Best v. Samuel Fox and Co. Ltd. [1952] 2 All E.R. 394.
5. [1970-72] 1 R.S.L.R. 14;
6. [1972] 2 E.C.S.L.R. 619;

In the English case of Smith v. Kaye,[1] it was stated that an action for enticement is wholly independent of sexually immoral factors, and therefore the action may be against a brother, or brother-in-law, of the wife concerned. But in the later case of Gottlieb v. Gleiser,[2] Denning, L.J., held that such an action cannot be brought against a wife's mother, whom the husband claimed had enticed his wife. Gottlieb v. Gleiser,[3] was followed in the Nigerian case of Nelson-Peregba v. Zaidan,[4] where Atake, J., extended the principle that actions are not maintainable against parents-in-law to cover the defendant who had enticed and harboured the plaintiff's wife as a favour to her parents.

In order to recover damages for enticement, the plaintiff must prove that the spouse has been enticed, procured, or persuaded by the defendant to cease from co-habiting, and consorting with her. Where, therefore, a plaintiff proved that the defendant had committed adultery with her husband, but failed to prove that the defendant had induced him to cease from cohabiting and consorting with her, the action failed.[5] In Adu v. Gillison,[6] it was held that for the defendant to be liable for enticement, some positive act, which must be clear and unambiguous, is expected to have been done by him in the decision of the wife to leave the husband's house and society, and that the defendant's merely helping her to carry out the decision which she had

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1. [1904] 20 T.L.R. 261; see also Mate v. Amanor [1973] 1 G.L.R. 469; Elliot v. Albert [1934] 1 K.B. 650 at p. 662, C.A..
2. [1957] 3 ALL E.R. 715.
3. [1957] 3 ALL E.R. 715.
4. [1973] 3 U.I.L.R. 217;
5. Newton v. Hardy, [1943] 149 L.T.R. 165.
6. [1962] W.R.N.L.R. 390; see also Smith v. Kaye [1904] 20 T.L.R. cf. Berthon v. Cartwright [1796] 2 Esp. 480 170 E.R.99; Philip v. Squire [1791] Peake 114; 170 E.R.99 Sharples v. Barton [1951] 13 W.A.C.A. 198.

taken herself, did not amount to enticement. Similarly, where a wife, apparently dissatisfied with conditions in the matrimonial home, due, it was suggested, to the polygamous propensities of the husband, solicited the help of her clan head in obtaining a shop, and living apartment, it was held that he had not enticed the wife in the strict sense in which the law interprets the word "enticed."

Under the Penal Code Law of Northern Nigeria, whoever takes or entices away any woman who is, and whom he knows, or has reasons to believe, the wife of any other man, with intent that she may have illicit intercourse with any person or conceals or detains with that intent any such woman shall be punished with imprisonment for a maximum term of two years, or with a fine, or both.[1] There is no similar provision for the enticement of a husband.

Seduction

Under English common law, a parent who lost the services of his or her daughter due to the daughter's pregnancy and child-birth as a consequence of sexual intercourse with the defendant was entitled to claim damages for seduction.[2] A right to claim damages in similar circumstances also obtains in many systems of customary law in Nigeria.[3] A parent whose daughter has been seduced in Nigeria may therefore claim damages for seduction under either the common law, or under customary law. In

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1. Penal Code Law, 1960, Cap. 89, Laws of Northern Nigeria, 1963 Revision, s. 389.
2. Actions for seduction were abolished in England by s.5 Law Reform (Miscellaneous Provisions) Act, 1970 which provides that no action shall lie for loss of services due to rape, seduction, enticement or harbouring; see the Eleventh Report of The Law Reform Committee, 1963; Cmnd. 2017 par. 22: "We think that the action for seduction as an offshoot of the action for loss of services no longer serves any useful purpose".
3. See Talbot, Peoples of Southern Nigeria, op. cit., p. 645; Ajisafe, The Laws and Customs of the Yoruba People, op. cit., p. 57; Forde, Marriage and Family Among the Yako, op. cit., p. 19; Obi, Modern Family Law, op. cit. p. 321; Customary Law Manual, op. cit., pp. 368-369.

Nkumatolu Nwagu v. Ezienyi[1], the plaintiff claimed the sum of £200 as damages for seduction resulting in pregnancy and consequent loss of services of his daughter. Magistrate Ekwulugo disbelieved the defendant's denial that he knew the girl carnally and awarded the plaintiff £60 damages. It was not stated in the judgment, however, which law the learned judge had applied. But under Yoruba customary law, seduction is the deprivation of a husband's right of consortium with his wife, by a man who takes her away with the intention of living with her as husband and wife. For a husband to obtain damages for seduction, it must be established that the defendant was responsible for the wife leaving the matrimonial home. In Atansuyi v. Gbadamosi,[2] Odumosu, J., held that for the defendant to be liable in damages for the plaintiff's loss of consortium of his wife, married to him under customary law, it must be established that the defendant was responsible for the wife leaving the matrimonial home, and that he had enticed her away from her husband. Seduction in Yoruba customary law is, in a sense, akin to enticement under the common law, except that it is not available to a wife whose husband has been seduced, and it involves sexually immoral factors.

Among the Yorubas, seduction is also a legal form of marriage, and is effected when a wife is seduced, and the dowry paid by the former husband is refunded by the seducer. Such a divorce followed by remarriage is referred to as "marriage by seduction"[3] in order to differentiate it from

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1. [1970] Suit No. ME/52/70, unreported; Enugu Magistrates Courts, decided on 17.12.70.

2. [1969] 2 ALL N.L.R. 222.

3. See Faremilekun and Ors. v. The State [1974] 3 W.S.C.A., 86 at p. 109; cf. the position in England where a Bill to prevent women marrying their seducers was introduced into Parliament in 1801; see Haydon's Dictionary of Dates, 1892, 20th edit. Actions for seduction are now abolished under English law, see Law Reform (Miscellaneous Provisions) Act, 1970, s.5.

"marriage in maiden", in which the wife is taken directly from her parents and the dowry is therefore paid to them.

Repayment of the dowry to the first husband is necessary for the legal validity of a "marriage by seduction". In Chawere v. Aihenu and Johnson,[1] the wife of a Yoruba customary marriage was seduced by the plaintiff who repaid £20 dowry to the first husband. He thus became her husband by seduction. Later, the wife, the first defendant, left the plaintiff and went to live with the second defendant. The plaintiff sued both defendants, for £24.10s. being the dowry he had repaid to the first defendant's first husband, and also for the purchase price of a sewing machine given by the plaintiff to the first defendant. It was held on appeal that the lower Court was wrong in holding that ipsis factis of a woman leaving her husband, and living in adultery with another man, the woman became the wife of the adulterer under native law and custom. It was held also that the second defendant could have been liable by way of damages for adultery, but upon the evidence the Court below was right in holding that such a claim was not made out since there was no evidence or suggestion that the second defendant was in any way responsible for the first defendant leaving the plaintiff.

If a husband is responsible for his wife leaving the matrimonial home, he cannot claim damages from her nor from any man with whom she subsequently lives.[2]

The difference between adultery and seduction in Yoruba customary law is a tenuous one and Customary Court judges do not generally distinguish between damages for adultery and damages for seduction. The Ibadan District Council (Marriage, Divorce and Custody of Children) Bye-

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1. [1935] 12 N.L.R.4; cf. Evoroja v. Evoroja and Anor [1961] 2 W.R.N.L.R.6.

2. Chawere v. Aihenu and Johnson [1935] 12 N.L.R.4; Ekundare, op. cit., pp. 46-47.

Laws, 1965, provides:

> "Adultery: Where a married woman leaves her husband and lives with another man as his wife for more than five days without instituting a divorce against her husband, the husband may take a criminal action for adultery against the woman or that other man (hereinafter called the seducer) the maximum punishment for which shall be £2/10 for the woman, and £5 for the seducer."[1]

Under this provision adultery is confounded with seduction, and adultery is not committed by mere illicit sexual intercourse with a married woman.

Harbouring a wife

Under the common law, a husband has the right to an action for damages against anyone who unlawfully harbours his wife. This remedy was never available to the wife, presumably on the ground that it was based on the quasi-proprietary interest which the husband had in his wife and in her services at common law.[2]

Under some systems of customary law, a husband, but not a wife, had a similar right against anyone who unlawfully detains his wife. If the wife, as is usually the case, is detained by her parents or other legal guardian, the husband is expected to appeal to them to return his wife to him. If such appeal fails, his normal remedy is to claim the refund of dowry he had paid with reference to the marriage.[3] Under modern customary law, where a husband fails to effect the return of his wife unlawfully detained, he may institute an action for her return in the Customary Court. It is usual to make an alternative claim for the refund of dowry

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1. S. 5.
2. See Winchester v. Flemming [1957] 3 ALL E.R., 711.
3. See Ajisafe, op. cit., p. 58; Talbot, The Peoples of Nigeria, op. cit., Vol. III, pp. 449 and 450-455; Forde, Marriage and the Family Among the Yako, op. cit., p.72; Charles Partridge, Cross River Natives, (London: Hitchinson and Co., 1905), p. 256; Obi, (Modern Family Law, op. cit., p. 229; Nwogugu, Family Law in Nigeria, op. cit., p. 91.

in the event of failure to return the bride, especially where she is detained by her parents. In Egri v. Uperi[1], the plaintiff claimed return of his "wife", married under customary law, from her father. The father denied the marriage.[2] Commenting on the claim the Ughelli High Court observed:

> "Such claim are justifiable, and the general opinion of the judges in this area is that it is impossible to limit by construction the beneficial jurisdiction of the customary court to grant a sort of mandatory relief to a husband against the parents of the wife where it is just and convenient to do so."[3]

The Court, however, noted:

> "When such a relief is granted and the parents fail to return their daughter to the husband on any ground the only right open to the aggrieved husband is to reclaim a refund of the bride-price as the customary court cannot enforce the observance of the order. The court cannot compel a wife to return to her husband as any attempt to do so will be an infringement of her fundamental rights under the Constitution of this country." [Supreme Court's italics]

The learned Judge, in spite of this pronouncement, nevertheless ordered the return of the defendant's daughter to the respondent. On appeal, the Supreme Court, comprising, Elias, C.J.N., Fatayi-Williams, J.S.C., and the late Ibekwe, J.S.C., said:

> "For our part, all we can say and we will put it no higher than that, is that it is arguable whether any order whether made by a customary court or by any other court, that a wife should return against her will, to her husband would not be inconsistent with her freedom of association as guaranteed by the provision of section 26(1) of the Constitution of the Federation. It is also arguable whether such an order would not be contrary to the principles of natural justice, equity, and good conscience. However, as

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1. [1974] 4 EC.SLR, 632; [1974] N.M.L.R. 22.
2. See Chapter V, p. 442 for the facts and other aspects of this case.
3. Egri v. Uperi [1974] 4 EC.SLR, 632 at p. 634.

> these points were not argued before us in this appeal we do not propose to express any views about them."[1]

This obiter dicta of the Supreme Court has already been noted in connection with cohabitation, but is repeated here because of the alarming case of Erurhobare v. Otebrise[2].

The plaintiff, who alleged he was married to the defendant's daughter under native law and custom, brought an action in the Adeje Customary Court for an order asking the defendant to return the plaintiff's wife to him. The plaintiff's only witness gave evidence of the marriage as follows:

> "The plaintiff approached me that he would marry the daughter of the defendant. I then accompanied him to the defendant who agreed to give his daughter to the plaintiff. We then went and paid the bride price. And the lady was handed to the plaintiff".

The customary court ordered that the defendant should return the plaintiff's wife within two weeks of the date of the order. This order was confirmed by the Acting Chief Magistrate. The defendant appealed further to the High Court and argued, inter-alia, that the decision of the customary court was against the weight of evidence; and that the acting Chief Magistrate erred in law in holding that the plaintiff was married to the defendant's daughter according to native law and custom. It was also urged that the order made by the Customary Court was unenforceable, being in the nature of an order for the specific performance of a personal contract, and that the decision of the court offended s. 22(a) of the Customary Courts Edict as it was repugnant to natural justice, equity and good conscience. The learned High Court Judge, Mrs. Omo-Eboh, held:

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1. Ibid., p. 638.
2. [1970] 1 U.I.L.R. 33.

1. that there was sufficient evidence on record to show that the customary marriage between the plaintiff and the defendant's daughter had been proved;
2. That the order of the Customary Court, Adije was lawful under customary law, and that the application of the principles of English law or common law to the instant case would defeat the purpose of the legislature in establishing customary courts;
3. that an order of mandamus would lie to enforce a duty arising under native law and custom;
4. that the rescission of the Order of the Customary Court, Adeje, for the return of the wife would have the effect of abrogating the unwritten customary law of the natives of Adeje, and that no court possessed the power to change the custom of the natives.

The learned Judge dismissed the appeal, and in effect ordered that the defendant return the plaintiff's wife to him.

The decision and judgment in this case is disturbing for several reasons:

(a) The learned Judge apparently did not consider the bride's consent to the marriage as necessary to the validity of the marriage. The evidence as accepted by her, fails to show that the girl's consent was given, or even asked for. Whatever may have been the custom in olden days, a sufficient number of cases, including cases decided by the Supreme Court of Nigeria, have decided that a woman's consent to her marriage is a sine qua non of a valid marriage under customary law.[1] The evidence of the bride's consent was specially relevant in the instant case, since the appellant consistently denied that a customary marriage had been concluded between the respondent and his daughter.

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1. See Osamwonyi v. Osamwonyi [1972] 1 ALL N.L.R. 357.

(b) The learned Judge's opinion that the principles or procedure of English law, or common law, would defeat the purpose of the legislature in establishing customary courts did not deter her from applying the English procedure of "mandamus to enforce a duty arising under customary law.

(c) The learned Judge's statement that "no court possessed the power to change the custom of the natives",[1] challenges a number of legislative provisions which provide for the application of customary law only "in so far as it is not repugnant to natural justice, equity and good conscience nor incompatible with any written law for the time being in force", as well as numerous decisions in which this principle has been applied in the superior courts of Nigeria.[2] As seen earlier, the application of this principle, from the middle of the nineteenth century onwards has been a potent factor in liberating women from the stranglehold of vicious customary practices. The principle is also a valuable aid, enabling the courts to bring customary law into line with the moral ethos of contemporary society.

(d) The Judge did not think it necessary to direct her mind as to whether the wife was willing to return to her husband or not. This consideration should have been the whole crux of the matter, since the subject matter of the

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1. Erurhobare v. Otebrise [1970] 1 U.I.L.R. 33 at p. 36.

2. See Chapter II above, for cases concerning the status of women in which this principle has been applied. The Customary Court Edict of the Mid-Western (now Bendel State) State, 1966, s. 22 (a) provides that a Customary Court shall administer the appropriate customary law "in so far as it is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any written law for the time being in force.

action, the res to be returned, was not an item of property, but an adult with a mind and will of her own and a right, granted to her under the Nigerian Constitution of freedom of association. There is no evidence of any system of customary law in Nigeria which provides that a wife who refuses to live, and whose parents also refuse that she should live, with her husband, should be forcibly handed over to the husband. In such cases, customary law provided an alternative remedy - the immediate return of the dowry paid by the husband on the occasion of the marriage. It seems contrary to public policy of the present Nigerian society, to expect a father to comply with such an order if the girl is unwilling to return or to stay with the husband, or to expect the girl to cohabit with anyone against her wishes.

(e) It is a cause for regret that the High Court Judge concerned in this case is a woman. Women judges have been seen in other countries, for example, Vietnam,[1] as more likely to have special insight and sympathy which may help to liberate women from the inferior position ascribed to them by customary legal systems; the dignity of women is seen as their particular concern. It is disappointing that a female Judge should treat a woman as if she were an item of property to be bandied between husband and father as this passage from the judgment of the learned Judge reveals:

> "It appears to me that it is customary for a Customary Court to order the return of a wife married under native law and custom. The fact that it is the custom of certain natives of Nigeria that it is the father who has the right to give away his daughter in marriage to a man from whom he has accepted bride-price

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1. To make sure that recent reforms of marriage and family laws are duly observed in the spirit of the law, all judges in cases relating to marriage in Viet Nam are women, who it is expected will "protect women in enforcing the laws against polygamy, and other feudal marriage practices, see Bergman, "Women of Viet Nam", 1974, op. cit., p. 195.

> cannot be overlooked.... As this case stands it is the defendant/appellant who gave his daughter away in marriage for consideration under native law and custom and in the same way under the same native law and custom he can order the return of his daughter to the plaintiff/respondent. The defendant/appellant must bow to the custom of his native land and as such I am of the opinion that he owes it a lawful duty under the custom of his native land to return his daughter to the plaintiff/respondent".[1]

One would have liked to see some reference being made to the consent of the girl being required, and her willingness to return to her husband being proved.

Under customary law there is no corresponding action for the harbouring of a husband, and this is yet again another instance of discrimination against women, contrary to the Federal Constitution of Nigeria, 1979.

MAINTENANCE

(1) The Right to Maintenance

From the discussion on the economic status of women above, it is evident that under most traditional systems of customary law, there was no obligation on a husband to maintain his wife in the sense usually understood in English common law, or in modern Nigerian law.[2]

The majority of societies in the olden days were predominantly agricultural.[3] The family was generally self-sufficient economically. Farm products, supplemented by wild animals caught in hunting, and fish provided the

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1. Erurhobare v. Otebrise [1970] 1 U.I.L .R. 33 at pp. 35-36.
2. See above, Chapter I, pp. 126-130.
3. See Guy Hunter "From the Old Culture to the New", in The Study of Africa", op. cit., p. 321; Colonial Reports, No. 409 of 1902.

main sustenance for the family.[1] Responsibility for support of the household was divided between husband and wife.[2] In most traditional societies, women were expected to make some contribution to the support of the household, and among a few communities they were entirely responsible for feeding the members of the family, the husband allotting land to them for this purpose. Effective fulfilment of this obligation determined their status in the family.[3]

Nigerian women in traditional societies, were never, nor are they now, simply housewives maintained by their husbands, in the same way as middle class English women were in the eighteenth and nineteenth centuries.[4] There is abundant evidence that in most societies, the women were the industrious workers who performed the greater part of the agricultural chores. A considerable proportion of the men's time was spent in political discussions. Mockler-Ferryman, who accompanied Major MacDonald on his mission to the Niger and Benue Rivers around 1890, speaking of the toils of women in traditional society notes:

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1. See Okigbo, "Social Consequences of Economic Development", in Social Problems of Change and Conflict, edit., by Van Den Berghe, op. cit., pp. 418, et. al., Fadipe, op. cit., p. 151.

2. See Phoebe Ottenberg, "The Changing Economic position of Women among the Afikbo Ibo', op. cit., p. 207; Green, Igbo Village Affairs, op. cit., p. 36. See Okonjo, op. cit., p. 107, and Table VII; Talbot, Tribes of the Niger Delta, op. cit., p. 196; Daryl Forde, "Land and Labour in a Cross River Village in Southern Nigeria", reprint, Geographical Journal, Vol. XC, No. 1, July, 1937, p. 40.

3. R. N. Henderson and H. K. Henderson, An Outline of Traditional Onitsha Ibo Socialization, (Ibadan: Ibadan University Press, 1966), p. 14.

4. There were a few exceptions, e.g. Kalabari wives, see Talbot, Tribes of the Niger Delta, op. cit., p.196

> "For real delightful idleness the African Mohammedan man 'licks creation' and I fancy no human being knows better how to laze away time. We studied him here for the first time from the deck of the Boussa. We were not overbusy ourselves - in fact only reading newspapers and watching natives; but our Mohammedan friends gave us many points and a severe beating. There they squatted all day long on the river bank, elbows on knees and one hand shading their eyes, their daily task being to watch their wives toil. These are the working-bees of Africa, they it is who do all the labour of the factory and all the trading, their husbands seeing that they are not idle, for the woman's work means wealth to the husband, and wealth means more wives and yet again wealth. Doubtless with civilization relief will come to these hardworking women; at present they have not been educated up to a 'strike', and know not the beauties of woman's rights and woman's wrongs".[1]

The common law rules whereby a husband had a legal duty to maintain his wife were the inevitable consequence of the legal principles relating to property: the wife was legally incapable of holding property, and of making contracts on her own accord. The husband, therefore, had a legal duty to provide "necessaries" required by his wife according to his station of life.[2] The very fact of marriage raised the presumption at common law that a husband was bound to maintain his wife.[3] There was no such presumption in most Nigerian systems of customary law, even where, as among the Idomas,[4] and some Igbo communities,[5] the wife's property legally

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1. Mockler-Ferryman, Up the Niger, op. cit., p. 52.
2. See Blackstone, Commentaries on the Laws of England, op. cit., p. 442; Manby v. Scott [1660] Smith's Leading Cases, 13th edit., p. 417; Povey v. Povey [1972] Fam. 40, at p. 50.
3. See National Provincial Bank Ltd. v. Ainsworth [1965] A.C. 1229;
4. See R. G. Armstrong, "Intestate Succession Among the Idona", in Studies in the Laws of Succession, edit. by J. Duncan M. Derrett, (London: Oxford University Press, 1965), pp. 212-229, at p. 225.
5. See Customary Law Manual, op. cit., p. 311.

belonged to her husband. The absence of duty of husbands to maintain their wives obtained even in societies where women were not predominantly engaged in agricultural. For example, among the Yorubas, where women traditionally engaged in trade, Bowen, in the middle of the last century observed:

> "every woman is a free dealer, who labours for herself... Even during the continuance of the marriage relations the woman is sole owner of her property and her earnings. She is not obliged to work for her husband, and has no claim on him for support, either for herself or her children. In this way the man escapes the burden of supporting his wives and children, except that he is obliged to furnish them with house room.[1]

Similarly, older interviewees testified to the fact that among the Ibibios formerly, "women got nothing from their husbands. They were given lands to farm and were expected to feed and clothe themselves and children, and also feed their husbands."[2] This was also the position among many other communities in Nigeria,[3] except among the kingly and chieftaincy classes, whose wives did no or little work.[4]

The right to maintenance, which it is alleged now exists in customary law,[5] was brought about by European civilization and the introduction and penetration of common law principles into customary law and practice, and represents a change in the legal status of a wife married

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1. Bowen, Central Africa, op. cit., pp. 304-305; Fadipe, op. cit., pp. 87-89; Ajisafe, op. cit., p. 62; Clarke, Travels and Explorations in Yorubaland 1854-1858, op. cit., p. 245; Lloyd, "The Yoruba of Nigeria, in Peoples of Africa, edit. by James Gibbs, op. cit., p. 543 et. al. Esenwa, op. cit., pp. 64-75, Bascom, The Yoruba of Southwestern Nigeria, op. cit., p. 65; Ajisafe, op.cit.p.62.
2. Information obtained by recorded interviews with women in Eket, esp. Madam Anne Edem, Madam C. Umoffia, Mrs. J. Ohpoh and Madam Bello Essenowo.
3. See Mockler-Ferryman, Up the Niger, op. cit., p. 140.
4. See Green, Land Tenure in an Ibo Village, op. cit., pp. 13-14; Green, Igbo Village Affairs, op. cit., pp. 34-36; see also Jerome Barkow, "Hausa Women and Islam", 1972, Canadian Journal of African Studies, Vol. VI, p. 325, for the position of non-Moslem women in Northern Nigeria.
5. See e.g. Nwogugu, Family Law in Nigeria, op. cit. pp. 215-216; Obi, Modern Family Law, op. cit., pp. 245-246; Kasunmu and Salacuse, Nigerian Family Law, op. cit., pp. 195-196.

according to customary law.

Unfortunately, the right to maintenance of a wife in customary law is more evident in academic literature than it is in judicial decisions or actual practice.

The present writer found more cases of husbands of a customary law marriage, claiming a breach of the wife's duty to provide them with food, than wives claiming lack of maintenance by their husbands. This is especially the case among the Ibibios. For example, in Nathan Bassey v. Etuk Udo Harry,[1] the plaintiff claimed damages from the wife for "depriving the plaintiff of her services, including feeding and conjugal rights since four months now". The husband alleged that he had allotted land to the wife, and as a result she had a duty to feed him from her crops. The wife denied liability on the ground that she was no longer married to the plaintiff and asked the court for a divorce. The couple were given some time to settle their domestic differences.

(ii) The enforcement of the duty of maintenance

The opinion expressed by writers on Nigerian family law and a few Customary Court judges, that a man has a "legal obligation to provide his wife with the necessaries of life according to his means and station in life", is a common law precept which has not penetrated deeply enough to be accepted as a legal principle of Nigerian customary law, and therefore enforceable by Nigerian Customary Courts. In only one of the numerous cases recorded by the present writer from the Customary Courts, was maintenance claimed by a wife of a customary marriage. In Isong v. Isong,[3] the

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1. [1972] Suit No. 43/72, unreported, Eket Customary Court, 2 Feb. 1972.

2. See e.g. the Customary Court decisions cited by Ekundare, Marriage and Divorce under Yoruba Customary Law, op. cit., pp. 67 et. al.; most of these cases were decided by judges who are legally qualified lawyers.

3. [1972] Suit No. 171/72/8055, unreported, Eket Customary Court, 20 April, 1972.

wife claimed maintenance from the husband for herself and two children of the marriage. She alleged that her husband, who was a teacher, had allotted no farming land to her, and had given her no maintenance. The Eket Customary Court ordered the husband to give £5 monthly to the wife for maintenance.

Nwogugu notes that customary law does not provide judicial machinery for the enforcement of the husband's duty to maintain his wife. If he fails to discharge his obligation, the wife may resort to extra-legal processes". After narrating some of these extra-legal alternatives available to the wife, the writer concludes that it is "a social rather than a legal sanction that compels a husband to maintain his wife under customary law."[1]

The writers who assert the existence of a husband's legal duty to maintain his wife under customary law, admit that the alleged duty cannot be enforced, and that "the only course open to a wife who has not been maintained by the husband is to bring an action for the dissolution of the marriage on that ground". It is not easy to appreciate why the right of maintenance cannot be enforced by Customary Courts, if such a right exists. It is submitted that contrary to the assertion of some writers, no such right existed under traditional customary law; this explains why such actions are very rarely brought to the Customary Courts.

A husband's duty in traditional customary law was to allot each of his wives a piece of land for her use,[2] and in those communities, like the Yorubas, where wives usually did little farming, to give each wife some kind of capital with which to start her trade. Once the wife was provided with land, or given trading capital, the main duty of the

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1. Nwogugu, Family Law in Nigeria, op. cit., p. 217.
2. Bohannan and Bohannan, The Tiv of Central Nigeria, op. cit., p. 50.

husband in this respect was satisfied, and the wife was expected at least to feed herself and her dependent children,[1] with little help from the husband.

This unsatisfactory state of customary law with regard to maintenance of married women led to the proposal of a Bill by a female member[2] of the former Eastern Nigeria Legislature - The Married Women (Maintenance) Bill[3] - which aimed at remedying the law. The Bill proposed giving Customary Courts the power to enforce maintenance of a wife in cases where the husband had deserted her, or had been guilty of persistent cruelty or wilful neglect to provide her with reasonable maintenance, or had ever compelled her to submit herself to prostitution.[4] Unfortunately, the Bill never became law.[5]

A few native authorities in the Northern States have made statutory provision for the maintenance of wives married under customary law. For example, under the Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order, 1959, a wife is entitled to maintenance, including food, clothing and housing at a standard commensurate with the husband's means, for herself and her dependant children.[6]

Divorce actions brought by women in Customary Courts which allege lack of care as a ground, nearly always include one or more other matrimonial offences, such as cruelty

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1. See Bascom, The Yoruba of Southwestern Nigeria, op. cit. p. 65; Ajisafe, op. cit., p. 63.
2. The Bill was introduced by Mrs. J. N. Mokelu, member for Enugu.
3. See Supplement, Eastern Nigeria Gazette, No. 73, Vol.14, 14 November, 1965.
4. Section 2(1) Married Women (Maintenance) Bill, 1965.
5. The Bill was overtaken by events mainly occasioned by the Nigerian Civil War, and after the war, it was not revived.
6. S. 8(2) (c).

or desertion. This is perhaps because Customary Courts' judges do not usually grant a divorce solely on the ground of failure by the husband to maintain his wife. In Esther Amoke v. Alimi Bello,[1] where the plaintiff petitioned for divorce solely on the ground of "want of care", the Court held that a better solution was for the husband to pay reasonable subsistence allowance to the plaintiff and the twin children of the marriage. The defendant was ordered to pay, through the court, a monthly subsistence allowance of £2, and a divorce was refused.

Parental rights and duties

A. Introduction

There is, perhaps, few other aspects of customary law which is presently surrounded by so much judicial confusion, and differences in practice, as the principle of law regulating the legal affiliation and custody of children born to a woman married under customary law.[2]

Legal affiliation and custody of children obviously affect the status of women. The right of a woman to take care of her own children and to participate in decisions affecting their welfare, may be jeopardised by the choice of the man adjudged to be their legal father. For example, a woman whose children are affiliated to, and given into the custody of a man with whom she has had no, or little, physical contact, except that he has paid dowry on her behalf (in some cases when she was a child), may be deprived of the right of every mother to take care of her children. While affiliation and custody of children are important to

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1. [1964] Suit No. ECCA/5A/52/64, unreported, Abeokuta Customary Court, Grade A, see Ekundare, Marriage and Divorce under Yoruba Customary Law, op. cit., p. 67.

2. See Kingsley, Travels in West Africa, 1897, op. cit., p. 498; "The ownership of children is a great source of palaver", remains true today; see also Okoro, The Customary Laws of Succession, op. cit., p. 102.

men, they are no less equally important to women, and vitally affect their status.

The present confusion surrounding the legal paternity and custody of children in customary law, specially affect women. It is desirable in all cases that law should be certain, but where marital and family relationships are affected, the need for certainty is perhaps greater than in some other areas. This discussion on custody and affiliation of children attempts to show how women are specially affected by the present uncertainty of law and practice in many Nigerian communities.

B. Affiliation

(1) Patrilineal societies

The customary law principle which previously applied in the overwhelming majority of patrilineal societies in Nigeria was that the children of a married woman are legally affiliated to her husband, or the man who paid dowry with respect to her marriage, regardless of who may have been the actual genitor. There is evidence that this was also the rule in other parts of Africa (and in many cases still is), Europe and Asia.[1]

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1. See e.g. Forde, "Double Descent Among the Yako", in African Systems of Kinship and Marriage", op. cit., p. 291; Thomas, Anthropological Report of the Edo-Speaking Peoples of Nigeria, op. cit., Part 1, p. 50; Elias, Groundwork of Nigerian Law, op. cit., p.297; Esenwa, op. cit., p. 73; Egharevba, op. cit., p. 19; E. C. O. Ilogu, Christian Ethics in An African Background, 1974, p. 30, Basden, Niger Ibos, op. cit., p. 226; Crocker, Nigeria: A Critique of British Colonial Administration, op. cit., p. 175; see Bradbury and Lloyd, The Benin Kingdom, op. cit.,pp. 190;-191, who describe a contrary rule as obtaining among the Itsekiri; Aniagolu, op. cit., p. 101. cf. Max Gluckman, "Kinship and Marriage Among the Lozi of Northern Rhodesia and the Zulu of Natal", in African Systems of Kinship, edit. by Radcliffe-Brown and Forde, op. cit., p. 201; and the Tanzanian case of Madole v. Mgogolo Dododo[1973] High Court, (P.C.) CIV App.11-DDM-72, Law Reports Tanzania, No. 18, 1973, p. 30 where it was held: "Among Tanzanian patrilineal tribes, all children conceived during wedlock, including adulterous children, belong to the husband". Kwikima, Ag.J., stated that "even if such were not the accepted custom, the ethics of our present time would not tolerate an adulterer benefitting from his sin to the detriment of his cuckold".

Vinogradoff states that the principle in all cases ^^^* the wife belongs.[1] This statement is confirmed by Smith[2] in relation to law in Arabia:

> "... a man is father of all children of the woman by whom he has purchased the right to have offspring that shall be reckoned to his own kin... The fundamental doctrine of Mohammedan law is that the son is reckoned to the bed on which he is born".

Various other writers attest the existence of this rule in societies in other parts of the world.[3]

So tenacious has been this rule in some societies, that there is a rebuttable legal presumption that a woman's husband is the father of her children. This presumption of law existed in English law as early as the twelfth century.[4] To rebut this presumption it is necessary to prove that the husband and wife could not, or did not, have sexual intercourse at the relevant time, or by establishing by medical evidence that the husband could not be the father of the child. Moreover, the common law rule was that neither spouse could give evidence of non-access to bastardize

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1. Vinogradoff, Historical Jurisprudence, op. cit., Vol. I. p. 197.
2. W. Robertson Smith, Kinship and Marriage in Early Arabia, 2nd. edit., (Cambridge: Cambridge University Press, 1907), pp. 109;110.
3. See e.g. Linton, The Study of Man, op. cit., p. 179; Radcliffe-Brown and Forde, op. cit., pp. 201;
4. Blackstone, Commentaries on the Laws of England, op. cit. Vol. I, p. 457; Bracton, On the Laws and Customs of England: Trans. by Samuel E. Thorne (Harvard University Press, 1968), Folio 6; Gardner v. Gardner [1877] 2 App. Cases, 723, H.L.; R. v. Luffe [1807] 8 East, 192; Anon v. Anon [1856] 23 BEAV. 273; but see Poulett Peerage Case [1903] A.C. 395, H.L.

* ^^^^- is that children belong to the male to whom

the wife's children.[1] This rule of evidence, of course, rendered the rebuttal of the presumption more difficult.[2]

In those systems of customary law in Nigeria where the rule applies, the presumption of law is irrebuttable. The affiliation of a child is governed by payment of dowry, and in most societies, all the children conceived before the dowry has been repaid legally "belong" to the man who paid the dowry.[3] This rule obtains even in cases where the husband dies before the child was conceived.[4] Provided the dowry has not been repaid before conception, all children begotten by the widow by a stranger to her husband's family, legally belong to the dead husband and can be claimed by his family.[5] In many societies, the children of a betrothed girl also belong to the man who has paid the dowry for her, even though her marriage to him has not been consummated, and she has never cohabited with him. The fact that she was engaged to him as a child is irrelevant.[6]

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1. Per Lord Mansfield in Goodright and Stevens v. Moss [1777] 2 COWP. 591. The House of Lords, in Russell v. Russell [1924] A.C. 687 H.L. unanimously held that evidence of non-access by a husband or wife was inadmissible in legitimacy proceedings, and by a majority also held that it was inadmissible in divorce proceedings; but see Law Reform (Miscellaneous Provisions) Act, 1949, S.7(1), which abrogated the common law rule applied in Russell v. Russell the Matrimonial Causes Act, 1973, s. 48(1) and Re Ampthil Peerage Case [1976] 2 All E.R. 411, a reverberation of Russell v. Russell, see below, Chapter XII, for the position under the statutory laws of Nigeria.
2. See Banbury Peerage Case [1811] 1 SIM and St. 153, H.L.; Gardner v. Gardner [1877] 2 App. Cas. 723 H.L.
3. See Mockler-Ferryman, op. cit., pp. 302-303; Nwogugu, Family Law in Nigeria, op. cit., p. 183; Leith-Ross, African Women, op. cit., p. 103, Basden, Niger Ibos, pp. 215, 226; Leith Ross, African Conversation Piece (London: Hutchinson, 1944), p. 71; Esenwa, op. cit., p. 73; Talbot, Tribes of The Niger Delta, op. cit., p. 195; Williamson, op. cit., pp. 55 and 57.
4. See Nwaribe v. President and Registrar, Eastern Orlu District Court, [1964] 8 E.N.L.R. 24 and above, Chapter II, p.187.
5. See authorities cited at n.1, p.593 above.
6. See Nwogugu, Family Law in Nigeria, op. cit., p. 224; Thomas, Anthropological Report of the Ibo,... op. cit. p. 68. Customary Law Manual, op. cit., p. 228, par. 287 (2).

The reason for this rule has been ascribed by Vinogradoff[1] to the fact that marriage is a form of property more than it is the law of relationship, not to speak of affection. If someone plants a tree or builds a house on the property (land) of another, without his consent, the owner of the land can claim the house or the tree. The same idea is expressed in the Yoruba saying that "the man who owns the tree owns the kola nut" and the Ibo: "the man who owns the mother goat owns the kid".[2]

The reason advanced by traditionalists, however, is that the rule protects the sanctity of marriage and the morality of the society. Any rule to the contrary would break the "whole fabric of social life in the Ibo community".[3] In Nwinya Ike v. Offia Nwa Una and Anor,[4] Okagbue, J., commenting on the application of the rule, said: "Customary law has several built in checks and balances and this is one of those rules by which adulterous associations have from time immemorial been checked".

Another reason for the retention of the rule is that an impotent man who, under the orthodox custom, could have children by providing the marriage payment in respect of a woman and allowing her to have sexual intercourse with an approved man, will not have children to inherit his property and perpetuate his lineage[5]. In this connection it is worth

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1. Vinogradoff, Outlines of Historical Jurisprudence, op. cit., pp. 197-202.
2. Cf. Pater est Quem Nuptiae Demonstrat, applicable in English common law, see Glanville, op. cit., book 7, chpt. 12.
3. See Okoro, The Customary Laws of Succession, op. cit., p. 102.
4. [1974] Suit No. E/1A/74, unreported, Enugu High Court; see also Eziekel v. Alabi and Ors. [1964] 2 All N.L.R. 43.
5. Okoro, The Customary Laws of Succession, op. cit., pp. 102-103.

noting Manu's opinion that "such advantage as a man would gain who should attempt to pass deep water in a boat made of woven reeds, that father obtains who passes the gloom of death leaving only contemptible sons".[1]

The High Courts, manned by judges trained in English law, no doubt influenced by the rebuttal rule applicable in English law, have attempted to change the law, and have held that once it is proved that a child does not belong to the legal husband in fact, to award him legal paternity simply because he had paid dowry for the mother of the child is repugnant to natural justice, equity and good conscience. In Edet v. Essien[2] the Commissioner of the Provincial Court found that the appellant had paid dowry for one Inyang Edet when she was still a child. Apparently, she had never lived with him as his wife. When she grew up, the respondent, having agreed with the girl to marry, obtained her parents' consent, paid dowry to them and took her as his wife. They lived together and had three children. These children were quite grown up at the time of the trial, and when asked by the judge to go to their father, of course went to the Respondent, since they were entire strangers to the appellant.[3] The case of the appellant was that:

> "Having conformed to the requirements of native law and custom whereby I became the husband of Inyang Edet I continue to be her husband and am entitled to any children she may bear (to whomsoever) until the money I paid as dowry for her is refunded to me. She cannot contract another legal marriage until the dowry is refunded to me".

The local Customary Court held his claim valid in law. The appeal was heard in the Provincial Court, which, dissatisfied with the evidence led to substantiate the claim, allowed the appeal. On appeal to the Divisional Court, Carey, J. held:

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1. Manu. IX, 161, as quoted by Maine, Early Law and Custom, 1883, op. cit., pp. 99-100.
2. [1932] 11 N.L.R. 47.
3. This background information to the case was given to the present writer by His Royal Highness Ntoo A. Etim, clanhead of the Ikpais, retired High Court Registrar, who was present at the trial.

> "... even assuming that the native law and custom as alleged by the appellant had been definitely established I am inclined to think that it should properly have been over-ruled in this case as being repugnant to natural justice, equity and good conscience having regard to the circumstances".[1]

The special circumstances of the case were that the girl had been only a child when the dowry was paid, and any consent given at that time was consequently illusory. The fact that the defendant and the girl had lived together for a number of years, and had three children before the claim was brought, and also that the two surviving children did not know the appellant and showed strong preference for their natural father, must have influenced the courts considerably.

There is no doubt that the strict application of this rule can result in grave injustice, as it actually did in Aja v. Ejiofor and Anor,[2] a decision of the High Court Okigwe. The case was on appeal from the decision of a Magistrate's Court. The first and second plaintiffs were a brother and sister whose father had died. The defendant married the second plaintiff and they lived together for ten years without issue. The second plaintiff left her husband's house and returned to her father's compound. Two years later the child whose custody was in dispute was born. The natural father of the child died, but three months after the birth of the child, another man repaid the dowry to the first husband, and became the second husband of the second plaintiff. This second husband was not interested in the child, and so the child was brought up by the first plaintiff, her uncle, until she was fourteen years old. The defendant then laid

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1. Edet v. Essien [1932] 11 N.L.R. 47 at p. 48.
2. Although the report of the case states that one of the children died, Registrar Etim remembered three children being present in court. He described them as "two grown up boys and one girl". See above, p.597, n.3.
3. [1974] Suit No. 40/10A/74, unreported, Okigwe High Court.

claim to her on the ground that at the time of conception and birth the dowry he had paid for her mother had not yet been repaid to him. The plaintiffs brought this action, claiming custody and maintenance of the child which they had borne from her birth until she was fourteen years old. Evidence, which was accepted by the Magistrate, established that when the child was born, the defendant had not been interested in her, and had publicly called her a "bastard". During the time she had been growing up he had shown no interest in her. The magistrate, however, held that since the plaintiffs and their witnesses agreed that "by their custom, the child, even today, was that of the defendant, who can have the child on payment of these expenses incurred by the plaintiff in the training of the child", they [plaintiffs] had no ground on their evidence for claim of custody, except that the defendant had not paid them their expenses for maintaining the child. He concluded:

> "That is not enough for the court to award the legal custody. However, in the interest of the child I hereby declare that the child will remain in the physical custody of the first plaintiff until she is eighteen years of age. The defendant is given free access to the child as is reasonable to a father. Case is dismissed. I make no order as to costs."

Against this decision the defendant appealed on the ground, inter alia that "the totality of the judgement of the learned magistrate is contradictory, vague, uncertain, unjustifiable and arbitrary". Obi-Okoye, J., held on appeal:

> "Undoubtedly there is a lot of morals in favour of the order for custody made by the court below, but the courts administer law not morals and since the claim for custody made by the plaintiffs was dismissed the grant of custody even for one hour thereafter, is to give them back with the left hand what the court had just denied them with the right hand".

The Judge rejected the argument of Counsel for the plaintiffs, "that this was an independent order based on the welfare of the child and which the court could make indpendent of its judgment", as untenable on the ground that

> "He [counsel] has not referred me to any statutory or decided authority that once the welfare of a child is raised in a case the court is obliged after giving its decision in that case to award the custody of that child to a party to the suit. Even if this power exists it can never be exercised in spite of the court's decision in the case. ... I am satisfied that having come to the conclusion to dismiss the respondent's case it was inconsistent of that decision to award the custody of the child to the first plaintiff".

He allowed the appeal and awarded the respondent ₦10 costs in the court below and ₦25 on the appeal.

Although the contention of the learned Judge that the "courts administer law, not morals" is appreciated, substantial justice could have been done in this case within the provisions of the law. The various Native and Customary Courts Laws of the States provide:

> "In any matter relating to the guardianship of children, the interest and welfare of the child shall be the first and paramount consideration."[1]

This section allows Native and Customary Courts to deviate from the strict application of customary law in guardianship cases. There are also several cases where this section has been utilized in the Superior Courts of Nigeria, and the principle of recognizing the child's interest and welfare as paramount, in cases arising under

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1. See for e.g. Customary Courts (No. 2) Edict 1966 (Eastern Nigeria) s. 24; Customary Courts Edict (Mid West State) No. 38 of 1966, s. 25; Customary Courts Law, Cap 31, Laws of Western Nigeria, 1959, S.23; Kwara State Area Court Edict, 1967 (No. 2 of 1967), s. 23. Native Courts Law of Northern Nigeria (N.R. No. 6 of 1956) s. 23; Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958, W.R.N.L. 456 of 1958, s. 14(1); see generally Kasunmu and Salacuse, op. cit., pp. 256-257; Nwogugu, Family Law in Nigeria, op. cit., pp. 260-262.

customary law has been applied in a number of cases.[1]

Customary law itself recognizes the principle of the best interests of the child being paramount, and in cases where the child is too young to be separated from its mother, it would postpone a grant of custody to the legal father.[2] Very few people would deny that it is not in the best interest of a female child, fourteen years of age, to be given into the custody of a man, unrelated to her by ties of blood, who had publicly called her a "bastard", and had ignored her existence until she was old enough to render him various services. Many people would consider her chastity at jeopardy under these circumstances, in view of the lack of blood relationship between her and the man into whose custody she had been given at the advanced aged of fourteen years.

The learned Judge confounded affiliation and custody which, it is respectfully submitted, are two different and separate concepts in most systems of law, although the legal right to affiliation, in many cases, establishes a claim to legal custody. The Magistrate in the trial court was perfectly justified in separating the concepts in the particular circumstances of this case.

The repugnancy principle was not considered in the case. Although it may not have been pleaded by counsel for the plaintiffs, such an omission was not a bar to its application by the High Court.[3]

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1. See Mariyama v. Sadiku Ejo, [1961] N.R.N.L.R. 81; Nkala v. Nkala [1971] suit No. ME/J/1597/71, unreported decision of Enugu Magistrate Court, decided on the 30th October, 1971. See further, post p609, Kasebiye v. Adeyemi [1961] Suit No. J.D/22A/60, unreported, 1 Sept. 1961, Jos, High Ct.

2. See Nwogugu, Family Law in Nigeria, op. cit., p. 260.

3. By virtue of the High Court Law, Cap 61, Laws of Eastern Nigeria, 1963 Revision, s. 22(1).

The facts and decision of this case was put by the present writer to several of the Customary Court Judges who were interviewed. Although they were almost unanimously in favour of the rule that a husband whose dowry has not been refunded should be entitled to all children of the wife, by whoever begotten, they asserted that in the circumstances of this case, giving the child to the legal father was repugnant to customary law. The customary law in most areas seems to be that if the legal husband does not recognize and lay claim to the child within a reasonable time, he would be considered as having waived his legal right, and his claim fourteen years later would be unenforceable. Some judges were of the opinion that a grant of custody, even in cases where the claim was expeditiously brought, would be denied, until all expenses connected with the birth had been fully paid by the legal husband.

Park's[1] assertion that a customary rule of law should be evaluated *in abstracto*, and that a decision should confirm or nullify a rule for all purposes, and not merely for those of the particular case has already been noted.[2] In certain later cases, however, Judges, have correctly distinguished the broad rule which some writers claim has been laid down in *Edet v. Essien*[3]. Thus in *Nwinya Ike v. Offia Nwa Una and Anor*,[4] where the second appellant had lived with her husband, deserted him and "married" another man without the consent of her parents, or repayment of dowry to the first husband, Okagbue, J. held himself not bound by *Edet v. Essien*.[5] He decided that the children of such a union legally belonged

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1. See Park, *Sources of Nigerian Law*, *op. cit.*, p. 72.
2. See above, Chapter II.
3. [1932] 11 N.L.R. 47.
4. [1974] Suit No. E/1A/74, unreported, Enugu High Court.
5. [1932] 11 N.L.R. 47.

to the first husband, and confirmed the decision of the Senior Magistrate at Awgu in this respect. He referred to the fact that the headnote in Edet v. Essien[1] is grossly misleading and gives the impression that the applicant was married to his wife under customary laws and that she left him and went to live with another man, and concluded

> "I do not consider it [the rule in Edet v. Essien] repugnant to equity and good conscience because if the natural father really intends to claim his children the family of the legal husband will tell him what to do if he does not know."

A similar opinion was expressed by Nwokedi, J., in Iloka and Anor v. Ibe[2]. In this case the second plaintiff was married to the defendant in 1960, in accordance with Urualla customary law, and later at Onitsha Roman Catholic church. During the Nigerian Civil War, the defendant asked her to leave the matrimonial home and accused her of poisoning him. The couple remained separated for five years, when the wife met the first plaintiff who approached her family with an offer of marriage. All members of the family, except the senior brother who was her legal guardian, agreed. The latter informed the second plaintiff that his sister was still married to the defendant. The plaintiff allegedly returned the defendant's dowry of ₦150(£80), but the defendant refused to accept it, and the money was lodged with a lawyer. The plaintiffs called two witnesses in support of their case, including a ninety-years old Chief who gave evidence of the Urualla custom, and who stated that the defendant refused to accept the dowry. The defendant alleged that he used to visit the second plaintiff's parents' home and sleep with her, that she became pregnant after one such visit and gave birth to twins, one of whom died. The plaintiffs claimed return and custody of the remaining twin detained by the defendant. The Judge found that the second

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1. Ibid.
2. [1965] Appeal No. HOW/CCA/41/65, unreported, Owerri High Court.

plaintiff and the defendant were still validly married under customary law and under the Nigerian Marriage Act. He held that giving the child to the legal husband represented a more rational approach to an apparently difficult situation, and stressed the fact that the parties in the case were "primitive people living in the primitive society of Urualla, and that in such circumstances only refund of dowry could confer status of legitimacy". He noted:

> "All the parties concerned are primitive people living in a primitive society of Urualla and it is difficult to see how any of them could escape the rules and tenets governing a primitive society such as theirs. The rules and norms of a modern society do not apply to the circumstances of this case... although illicit association may be permissible in Ibo society, the association between the plaintiffs is yet to acquire a measure of respectable acceptance of marriage status by the generality of their Urualla community. It therefore follows logically that any issue of such illicit association can never legally be said to belong to the parties. Such a child would be considered as a product of clandestine association of lovers and no more".

It is interesting to note that although the learned Judge found that the second plaintiff and the defendant were spouses of a statutory, as well as a customary marriage, he applied customary law exclusively. No reference was made to the general law of Nigeria under which the child may have been adjudged illegitimate[1] and custody given to the mother.[2]

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1. See Egwunwoke v. Egwunwoke [1966] 2 All N.L.R. 1, pp. 3-4; Section 147 of the Evidence Act, Cap 62, Laws of the Federation of Nigeria, 1958 Revision, as amended by the Matrimonial Causes Decree, 1970, Decree No. 18 of 1970, ss. 84 and 115(3).
2. See Enwonwu v. Spiro [1965] 2 All N.L.R. 233; Adu v. Family Welfare Officer and Ruby Mae Lincoln [1970] Suit No. LD/14A/70, unreported, Lagos High Court, 9 June, 1970, where the custody of an illegitimate child of a Nigerian and a female U.S. citizen was granted to the mother, see Nwogugu, Family Law in Nigeria, op. cit., p. 258, n.12.

The above decisions may be compared with the decision in Mbiereonwu v. Okorie and Ors.[1] The wife in this case lived with her husband the plaintiff, for about fourteen years. She then left him, and cohabited with another man by whom she had a child. The husband claimed legal paternity and custody of the child, as his dowry had not been repaid. The Oru District Court affiliated the child to him, but deferred grant of custody until the child had grown. The County Court dismissed the appeal of the defendants against this decision, but on further appeal to the Magistrate's Court, the decision was reversed. The plaintiff's appealed to the High Court. Egbuna J. said:

> "I cannot see how the plaintiff would claim this child just because the dowry was not refunded before the child was born. This is clearly against the principles of natural justice and equity... I have read the case of Edet v. Essua [sic] 11 N.L.R. p. 47, referred to and I fail to see where the learned Magistrate misinterpreted the principle of that case".

It can be seen from these few cases that the application of the rule governing the affiliation of children is in general disarray. This confusion is reflected, not only in judicial decisions, and among academic writers,[2] but in a diversity of practice in the various communities. Older people generally are opposed to any change in the law, and assert that, regardless of court decisions, such children would continue to be treated as the legitimate children of the legal father.

This is the view also of most Customary Court Judges, unless they are obliged by legislation to change the rule, and even then they apply the legislation with apathy and distaste.[3] The younger elements, on the other hand, see the abolition of the rule as progressive. Their main

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1. [1965] Suit No. HOW/CCA/41/165, unreported, Owerri High Court.
2. See e.g. Okoro, op.cit., p. 104; who argues that paternity of a child should be awarded to its biological father; and Obi, Modern Family Law, op. cit., pp. 305-306 who argues to the contrary.
3. The Judge of Calabar District Customary Court told the present writer that from time immemorial, the child is given to the legal husband in Efik land and among the Qua Efut, and that there has been no change; interview held on 25 October, 1977 at Calabar.
   The Customary Court in Eket, following the decision in Edet v. Essien; awards such children to the actual genitor.

contention seems to be that, since such children lack ties of blood to the family of the legal father, they also lack loyalty to them. According to an informant from Uyo, an Ibibio community:

> "Our community from time does not recognize that rule. Such children are traitors to the family. Wherever your enemies are, there they will be. If you have a court case with another family, they would take all your secrets to the other family so that they can defeat you in court. They have no love for the family."

This was the opinion of several other informants in the various communities, who substantiated their assertions from their practical experiences.

The greatest sufferers in this legal dilemma are perhaps the children themselves who are liable to be rejected by both families. In Onitsha where the community observes the old rule, such children are often treated with distrust by the family of the legal father, while they may be despised as "bastards" by the family of the natural father. In addition, in some systems of law, for example in Enugu-Ezike, and Etteh clans of Ibo-Eze Division in Anambra State, the natural father has the right to reject or accept such children at his option,[1] and, if he chooses the former course, the children have no legal claim on him, nor on their mothers' legal husbands. In most societies, the legal father has the right to disclaim such children at his option, even though the natural father is not entitled to claim the children. The result of this is that the children belong to neither family, which is a very serious situation for a person, especially a male person, to find himself in.

The injustice of the system is evident. It demonstrates the unfortunate consequences of regarding dowry as a sine qua non of a marriage contract and a refund of it as a necessary element of a divorce. Men who refuse to accept the refund

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1. See The Customary Law Manual, op. cit., p. 315.

of dowry are anxious to claim children subsequently born to the wife and another man, in order to increase their own lineage. In practical terms, the system is little removed from "child-buying".[1]

Tying the affiliation of children to the payment of dowry may prejudice a woman's opportunity to remarry. Many men are not prepared to refund the first husband's dowry until the woman has proved her ability to bear children for them, especially where she had none for the former husband, yet when she has borne the children, they are legally affiliated to the first husband, because his dowry has not been repaid at the time of the children's conception.

(ii) Matrilineal societies:

Among some matrilineal societies in Nigeria, children are affiliated for some purposes to their mothers' family, where they also claim rights of inheriance.[2] As previously noted, there are a few such societies in Nigeria including some Igbo communities, for example Chafia, and Afikpo clan of Afikpo, Divisions. The only matrilineal society actually visited by the present writer was the Ekoi (Ejagham)[3] of Calabar. In an interview[4] with the head of the Ikapi clan, His Royal Highness Ntoo A. Etim, he stated the position in relation to the affiliation of children:

> "Among our people, a woman virtually owns the children. She has the right to take all the children away if she leaves her husband, and it is better for her to do so, since everything the children inherit will be from her own family. Women wield very powerful position among us".

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1. See Bohannan and Bohannan, The Tiv. of Central Nigeria, op. cit., p. 77
2. See Okoro, Customary Laws of Succession, op. cit., pp. 160-167.
3. In 1971, the projected population of the Ejagham, based on the 1963 Nigerian Census was 20, 867, comprising 10, 856 females and 10,011 males; see Statistical Digest, South Eastern State, 1971, p. 10.
4. The interview was held at his palace in Calabar on 26 October, 1977 .

The Chief also stated that about three years ago the Government of the former South-Eastern State appointed the Ikpeme Commission to record the customs and usages of the peoples of the State. The Ekois met in Council and decided that the custom whereby children are affiliated to the family of the mother should be changed, as it was not in the best interest of the community. It was the general view that, since children do not inherit from their fathers, there was no incentive for a man to produce or amass wealth. The decision of the Council was recommended to the Ikpeme Commission for adoption.

Among the Ikpais, it was alleged that a husband cannot claim a child begotten by his wife for another man. This is also the position among the Igbos of Ohaffia Division, a matrilineal society, where the adulterer has a right to claim his child,[1] and both laws may be compared with the position among the Yako, where a double-descent system obtains. Forde, who conducted extensive research among the Yako reports:

> "There is no doubt that it is the transfer of the libeman [dowry] which gives the husband legal rights to his wife's services and to the social fatherhood of the children born to her during the marriage."[2]

Meek[3] asserts that among most non-Moslem communities in the Northern States, a very marked difference in the status of children born of a marriage exists. Where the dowry is low, the wife's family usually has some claim on the children born of the marriage, but where the dowry is high, there is no such claim. The position is the same as in those societies in the Southern States, previously noted, which operate a two-tiered system of dowry payments.

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1. Customary Law Manual, op. cit., p. 315; par. 382, (1) (a).
2. Forde, "Double Descent Among the Yako", op. cit., p.223.
3. Meek, A Sudanese Kingdom, op. cit., p. 376.

C. Custody

Custody in this section is used in its wide sense to connote the whole bundle of rights and powers vested in a parent or guardian, including physical control.[1] Under most systems of customary law in Nigeria, the husband has an absolute right to the custody of children begotten by his wife.[2] Thus in Nkala v. Nkala,[3], where the parties were married under Igbo customary law, it was held that the claim of a father must prevail, unless the court is judicially satisfied that the welfare of the child requires that the parental right should be superseded. This was also the position under the common law,[4] where his right was so extensive "that it inevitably reminds us of the position of the paterfamilias in Roman law".[5] This absolute right enabled him to claim, even from the child's mother, the custody of a child still in the suckling stage. In R. v. De Manneville,[6] a child eight months of age was taken forcibly by its father from its mother's breast. Lord Ellenborough, C.J., refused

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1. For the legal meanings of the word custody and the rights involved in the concept see Hewer v. Bryant [1969] 3 ALL E.R. 578, 585, C.A.; [1970] 1 Q.B. 357, 373; See also J.C. Hall, "The Waning of Parental Rights", S.L.J., 1972, 248.

2. See Nwogugu, Family Law, op. cit., p. 260; Ellis, Yoruba-Speaking Peoples, op. cit., pp. 186-187; Lawson v. Lawson [1973] 7CC HCJ.1.

3. [1971] Suit No. ?ME/J./1597/71, unreported, Enugu Magistrates Court, 30 October 1971, the judgement was upheld on appeal.

4. R. v. Manneville [1804] 5 East, 221; Thomasset v. Thomasset [1894] P. 295, C.A.; see also Graveson and Crane, A Century of Family Law, op. cit., pp. 17-19; Cf. Jeremy Bentham, The Theory of Legislation, edit. by C.K. Ogden (London Kegan Paul, French, Trubner & Co. Ltd). 1931),pp.74-76.

5. P. H. Petit, "Parental Control and Guardianship", in A Century of Family Law, edit. Graveson and Crane, op. cit., p. 56.

6. [1804] 5 EAST, 221.

to disturb the father's custody, and Lord Eldon took the same view in the Court of Chancery.[1] So absolute was this right that the courts had no jurisdiction to grant even a right of access to the mother. In Ball v. Ball,[2] Sir A. Hart, Vice Chancellor, said he knew "no act more harsh or cruel than depriving the mother of proper intercourse with her child", yet he found no grounds on which he could have taken an alternative decision.[3]

Customary law was less harsh. In the interests of the child, it would award care of the child to the mother at least until the child was weaned.[4]

The customary law principle of a father's absolute right of custody to his legitimate children has been eroded by legislative provisions. The various Native and Customary Courts Law of the various States provide that

> "In any matter relating to the guardianship of children, the interest and welfare of the child shall be the first and paramount consideration."[5]

As previously seen this section allows the courts to deviate from the strict rules of customary law, as it applies to the custody of children. In Mariyama v. Sadiku Ejo[6], the court

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1. De Manneville v. De Manneville [1804] 10 VES. 52.
2. [1827] 2 SIM. 35.
3. See further, below Chapter X.
4. See Partridge, 1905, op. cit., p. 257; Ellis, Yoruba-Speaking Peoples, op. cit., p. 187.
5. See also the recommendation of the Economic and Social Council resolution 1068F (XXXIX), 16th July, 1965; the child's welfare should be the overriding consideration in determining questions of custody and guardianship.
6. [1961] N.R.N.L.R. 81.

said that "the child's benefit was of paramount importance".

Specific statutory enactments, have in addition, encroached on the rights of a father to custody of his children in certain parts of the country. For example, the Ibadan District Council (Marriage Divorce and Custody of Children) Bye-Laws provide that the custody of all children should normally be awarded to the natural father whether or not such natural father is married to the mother,

> "Provided that no child shall ordinarily be removed from the custody of its mother until it has reached the age of at least five years, and provided also that in the application of the provisions of this bye-law, the court in exercising its discretion, shall have due regard to the welfare of the child in all the circumstances of the case."[1]

In spite of these provisions[2], Customary Courts do not grant custody, to a mother except when the child is very young. In 154 disputed affiliation cases examined by the present writer, which were decided in 1976 at Grade B Customary Court, No. 4 at Mapo, Ibadan, custody was invariably granted to the man adjudged the natural father. The welfare of the children was not considered, and custody to the mother was only granted when the children were under five years of age.

This may be compared with applications for custody, in the High Courts, in divorce cases involving a statutory marriage. The principle laid down in the English case of In Re Thain (An Infant)[3] is frequently applied, and custody

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1. Par. 8.

2. This provision changed the traditional Yoruba customary law, by which a woman's husband was the legal father of her children begotten during the marriage, and thus gave him right to their custody. The Customary Court Judges in Ibadan are not in favour of the change, and honour the old law as far as they are able to do so, see Kansummu and Salacuse, op. cit., p. 218; Ekundare Marriage and Divorce Under Yoruba Customary Law, op. cit. p. 69.

3. See the cases of Ojo v. Ojo [1969] 1 All N.L.R. 435; Babalola v. Babalola [1972] 11 CC HCJ, 110; Oloyede v. Oloyede [1975] 3 W.S.C.A. 73; Okafor v. Okafor [1971] Suit No. 0/6D/71 unreported decision of Onitsha High Court. Cf. Oni v. Oni [1973] 7 CC HCJ 41 and Oguntokun v. Oguntokun [1972] 12 CCHCJ 106.

is generally awarded to the successful party. In Afonja v. Afonja,[1] however, it was held in the Western Region Court of Appeal

> "in deciding the question of custody the welfare of the children is the paramount consideration, though the conduct of the guilty party is also a matter to be taken into account, and where the father places the child with other persons not withstanding the fact that they might give it a very good home, the mother should have the custody where (as in this case) it appears that she can also give it a good home."

Similarly, in Apara v. Apara[2] the Supreme Court held that it should not be assumed that the successful party must have custody of the children, or that he is the proper party to whom the care of the children should be entrusted. This principle has now been incorporated into the Matrimonial Causes Decree 1970, which does not apply to customary nor Moslem marriages.[3] Social and psychological evidence which might be of vital importance in estimating the effect which living with a particular parent may have on the child is rarely resorted to even by the Superior Courts in Nigeria.[4]

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1. [1971] 1 U.I.L.R. 105.
2. [1968] 1 ALL N.L.R. 241; cited with approval by the Nigerian Supreme Court in Ojo v. Ojo [1969], 1 ALL N.L.R. 435 at pp. 440-441.
3. For the application of the principle in the Higher Courts, see Jegede v. Jegede [1972] 12 CCHCJ. 121, which followed Re L. (Infants) [1962] 3 ALL E.R.1 C.A.; "Whilst the welfare of the children is the first and paramount consideration, the claims of justice cannot be overlooked", per Lord Denning M.R., but see Re L. [1974] 1 ALL E.R. C.A.; Cole v. Cole (1941) 16 N.L.R. 9, the wishes of a child are not enough to over-ride the general rule; Oyedu v. Oyedu, [1972] 2 E.C.S.L.R. 41; the custody of the parents, including the mother, is preferred to that of a foster parent however benevolent. See further, below, Chapter X.
4. See Naomi Michaels "The Dangers of a Change of Parentage in Custody and Adoption Cases", 83 L.Q.R. pp. 547-568.

The absolute right of the father to the custody of his children under customary law may be inherited by his family after his death, even if it results in depriving the widow of her children. Thus in the case of In The Estate of Agboruja,[1] it was decided that to make the half brother of the deceased father the legal guardian of the deceased's children in prefernce to his widow was not inequitable, but in Laromeke v. Nekegho,[2] the Divisional Court of the Gold Coast held that the Urhobo (Nigeria) customary law whereby a widow who refuses to marry her dead husband's heir must hand over her children to him was "repugnant to natural justice, equity and good conscience within the meaning of the Courts Ordinance.

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1. [1949] 19 N.L.R. 38; see also Nwaribe v. The President and Registrar Oklu District Court [1964] 8 E.N.L.R. 24.
2. [1958] 3 W.A.L.R. 306.

CHAPTER VIII

DISSOLUTION OF CUSTOMARY LAW MARRIAGE

> For women, divorce is not
> Respectable; to repel the man, not possible.
> ... And if in this exacting toil
> We are successful and our husband does not struggle
> Under the marriage yoke, our life is enviable.
> Otherwise death is better. If a man grows tired
> of the company at home, he can go out, and find
> A cure for tediousness. We wives are forced to look to one man only.
>
> Euripedes, Medea.[1]

1. Introduction

There are two ways by which a customary marriage may be dissolved:

(i) by an act which is recognized by the community as legally ending the marriage, i.e. divorce

(ii) by the death of either spouse (subject to the argument that customary marriage being essentially the union of two families may continue even after the husband's death).[2]

Divorce

Divorce spells the end of a marriage, and has always been, and present evidence indicates always will be, the method by which a high percentage of marriages are dissolved, legislative or customary law provisions which prohibit divorce, not withstanding.[3] Marriage is a personal relationship and therefore cannot be entirely controlled by law. Restrictive regulations which fetter

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1. Euripedes (c. 480-406 B.C.), Medea, trans. by Philip Vellacott (London: Penguin Classics, 1971), p. 24.

2. See further, below, pp. 678-685.

3. See e.g. Ajisafe, The Laws and Customs of the Yoruba People, op. cit., p. 58; Egharevba, op. cit., p. 20; Begho, Law and Culture, op. cit., p. 50; Talbot, Peoples of Southern Nigeria, op. cit., p. 632.

the freedom of either spouse to effect a divorce are invariably unsuccessful, and in the present society, may be regarded as also immoral.

Divorce is a necessary concomitant of marriage in the same way as death is a necessary concomitant of living - the difference is only a matter of degree. Muhammed described it many centuries ago as the most detestable of all permitted things,[1] and recently, Epstein has referred to it as "a lugubrious subject".[2] This notwithstanding, divorce has always been possible among nearly all communities, to various extents. This fact renders Lord Penzance's classic definition of marriage as a "life-long union", in Hyde v. Hyde[3] incomprehensible, although admittedly, divorce was less prevalent in 1866, than it is now, in English society. Bromley has suggested that the only interpretation that can be put on Lord Penzance's statement is that the marriage lasts for life unless it is previously determined by a decree or other act of dissolution.[4]

There is some evidence that it was legally impossible to dissolve a marriage by divorce in a few traditional systems of customary law in Nigeria. In the majority of Nigerian customary laws, however, divorce was traditionally possible, although relatively rare. There are very few societies in contemporary Nigeria which absolutely prohibit divorce, at least, divorce initiated by the husband, and most customary law systems also permit a wife to divorce her husband. It may be noted that the wife's equality in this respect is due to the fact that a customary marriage is essentially a union between

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1. See Chapter IX, below, p. 84.

2. Joseph Epstein, Divorce: The American Experience (London: Jonathan Cape, 1975), p. 12.

3. [1866] L.R.I.P. and D. 130, 133.

4. Bromley, Family Law, 1977, op. cit., pp. 15-16.

two families of equal legal status, and a wife cannot dissolve her marriage without the consent and active participation of her family in traditional society. The right to dissolve a customary marriage resides, not in the wife, but in her family. This is the legal position in some systems of customary law, even in contemporary Nigerian society. For example, among the Igbos, a wife can only institute a divorce action in court by suing through her legal guardian, who must be a party to the action. The wife on the other hand, need not be a party to the divorce suit initiated on her behalf.

A customary marriage may be dissolved either extra-judicially, that is, by mutual agreement between the spouses and their families, without the intervention of a court or other judicial body, or judicially, by the order of a customary court. In either case, customary law draws a clear distinction between spouses who are divorced and those who are merely separated. The procedure for obtaining an extra-judicial divorce is relatively informal, but as will be later seen, certain acts must be performed before there can be a valid divorce,[1] except in the case of a marriage by "mutual consent only", which as previously noted,[2] only operates among some Yoruba communities.

In most systems of customary law, refund of dowry, or its waiver by the husband, is the only sine qua non of a valid extra-judicial divorce, although certain other acts such as a symbolic public severing of the marital bond may have important evidential value.

Usually a refund of dowry, or its waiver by the husband is also necessary for a judicial divorce unless

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1. See Rafatu Morin and ORs. v. Yewande Soyemi [1973] 3 U.I.L.R. 428 at p. 429: "Proof of divorce, even that by native law and custom, requires much more than just an oral statement that the parties to a customary marriage are divorced."

2. See further, above, Chapter III.

there are local bye-laws to the contrary.

It should be noted that in contradistinction to divorce in English law, no formal grounds need be advanced for a divorce in customary law, since the spouses may effect a divorce by mutual consent. Recently, however, a few local authorities have enacted bye-laws enumerating certain defined grounds which must be established before a divorce may be granted by the courts.[1] As will be later seen, many of these provisions discriminate unduly against women, and in this respect infringe the constitutional right to freedom from discrimination on grounds of sex.

Laws regulating the capacity to effect a divorce, divorce procedure, and the validity and incidents of divorce are patently vital to the legal status of women in marriage. This section discusses the divorce laws of the various systems of customary law in Nigeria, which are particularly relevant to the status of women. As in previous sections the laws and practices which obtained in traditional societies, and which to some extent, are still found in various parts of the country are discussed, as they provide important evidence of change, and also provide a background for an assessment of the effect of the changes on the position of women.

2. The Recognition of Divorce.

A. The traditional society.

To what extent was divorce possible in traditional society? There is some evidence which supports the allegation that in a few traditional Nigerian societies a marriage could not be legally dissolved by divorce. The parties may separate and live apart from each other, but the legal

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1. See further, below, pp.645-647.

bond nevertheless remains.[1] Thus in Yoruba customary law, various writers have stated that traditionally, divorce was not possible. Ajisafe states:

> Divorce is not permissible in native law. Husband and wife may be forced to separate. The woman may go and live with another man. In that case the man is bound to pay back the dowry to the husband. But the family of the woman will not receive any dowry from the other man nor regard him as the lawful husband of the woman.[2]

This statement is interesting because, as will be later seen, refund of dowry legally dissolves the marriage, and the refund must be made to the husband or his family to effect a valid divorce, but as previously noted, payment of dowry to the parents or other legal guardian of the bride is an essential legal element of a dowry marriage.[3] The legal position seems to be, therefore, that the woman is divorced from her previous husband (by refund of dowry), but she is not married to the man who refunded the dowry to the husband, since no dowry is paid by the former to the parents of the woman.

Ekundare criticizes Ajisafe's statement on divorce in Yoruba customary law. He submits that the statement is "wrong" because Ajisafe failed to appreciate the customary position of the man who returns the dowry to the husband. He says:

> Ajisafe's interpretation of the customary law on divorce is wrong as it contradicts both the old and the modern concept of divorce among the Yorubas.[4]

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1. See Bradbury and Lloyd, The Benin Kingdom, op. cit., p. 190; "A ceremony performed before the ancestors to solemnize marriage can never, according to strict custom be revoked"; see also Lopez and Ors. v. Lopez and Ors. [1924]5 N.L.R.47; Meek, Northern Tribes of Nigeria, op. cit., p. 216; Trimmingham, Islam in West Africa, op. cit., p. 170.

2. Ajisafe, Laws and Customs of the Yorubas, op. cit., p. 58; see also Forde, The Yoruba-speaking Peoples of South-Western Nigeria, op. cit., p. 28; Delano, The Soul of Nigeria, op. cit., p. 142.

3. See further, below, Chapter VI.

4. Ekundare, Marriage and Divorce under Yoruba Customary Law, op. cit., p. 29.

In support of his contention, Ekundare cites the unreported case of Daramola Ikotun v. Sebolatan Tayc,[1] decided by the Grade B Customary Court, Ilesha in 1958, in which it was held that dowry could be repaid to the first husband of a woman by a man who wanted to marry her. Refund of the dowry in this manner constitutes a marriage to the man who made the refund. Undoubtedly this is the position in the present Yoruba customary law, but Ajisafe's and other similar statements of the previous indissolubility of customary marriages[2] should not be summarily dismissed as inaccurate. It is a well-known fact that customary law is not stagnant and its changing nature has already been noted in a previous chapter.[3] A closer examination of the statements seem to indicate a transition in customary law in this respect, and it is interesting to imaginatively reconstruct the development of divorce in Yoruba customary law.

Ajisafe's statement may be taken as representing the law in the known earliest period, during which divorce was legally impossible, although the spouses may separate.

There is evidence of the fact that a woman who was cruelly treated by her husband had the right to seek refuge from his cruelty by running to the Oba's palace and taking hold of one of its pillars. No one, including the husband, was permitted to remove her from the pillar. The Oba (King) or other Chief, after listening to the evidence of both spouses, if the husband was adjudged guilty of excessive cruelty, would keep the wife at his palace until an acceptable suitor repaid the dowry paid by the former

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1. [1958] Grade B Customary Court, Ilesha, see Ekundare, op. cit., pp. 15, 20, and 29.

2. See e.g. Elias, The Nigerian Legal System, op. cit., p. 298; Johnson, The History of the Yorubas, op. cit., p. 116; Forde, The Yoruba-Speaking Peoples, op. cit., p. 82; Bradbury and Forde, The Benin Kingdom, op. cit., p. 52; Talbot, Peoples of Southern Nigeria, op. cit., p. 632; Temple, Notes on the Tribes, op. cit., pp. 43,

3. See above, Chapter II, pp. 178-180.

husband. A divorce was thus legally effected.[1] Since no payments were made by the second husband to the woman's parents they would continue to regard the first husband as the legal husband and the second one as only a paramour. Thus Johnson says:

> Divorce is very rare; so rare as to be practically considered as non-existing. It is by no means easily obtained especially when there are children of the union... a divorce is never granted by the rulers of the town until all possible means of reclamation have been exhausted.
>
> A woman divorced from her husband can never be married or taken up legally by another man; hence the saying A ki isu opo alaye (no one can inherit the relict of a living man.[2]

The third stage was marked by direct negotiation between a husband who was separated from his wife and who was willing to accept a refund of dowry paid when the marriage was contracted, and a prospective husband willing to refund the dowry and take over the woman as wife. In such a case, the wife's parents, not having received payment of dowry from the second man would continue to regard the first husband as the legal one. This would be the position until the practice of direct refund to the husband has become sufficiently general as to be regarded as creating a binding marriage between the divorced wife and the man making the refund.

The last stage in the transition, the present stage, is one under which divorce may be effected by the repayment of the dowry by the wife herself, whether or not she has a prospective husband in view. Refund of dowry by the prospective husband automatically constitutes a marriage

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1. See Elias, The Nigerian Legal System, op. cit., p. 298; Delano, The Soul of Nigeria, op. cit., p. 142; Delano, An African Looks at Marriage, op. cit., p. 31.

2. Johnson, op. cit., p. 116; cf. Fadipe, Sociology of the Yoruba, op. cit., p. 91; "Divorce was effected by the process of refunding what was known as ife, that is, what was paid in the course of courtship".

between him and the divorced woman (marriage by seduction).[1]

If evolution of the law is thus viewed, Ajisafe's statement becomes rational, and is certainly supported by evidence, not only from other writers on Yoruba customary law, but also from the practice in other societies. For example, Egharevba writes:

> According to Benin law and custom no divorcement or refund of dowry was known in ancient days. The modern system of divorcement or refund of dowry is quite foreign and is an introduction of the British Government.[2]

It should be noted that a divorce by refund of dowry existed among many Nigerian societies before colonization by the British Government. For example, Bowen, as early as the mid-eighteenth century, and Ellis a few years later, refers to divorce by refund of dowry as practised by the Yorubas.[3] There is evidence that this was the traditional method of divorce among several other communities before the advent of the British.[4]

Whatever the position may have been with reference to the recognition of divorce in Yoruba customary law, and a few other customary law systems, in the large majority of traditional societies as defined in this thesis, divorce, by the mutual consent of the spouses, or by unilateral action of either spouse was legally possible, invariably by refund of dowry.

In a few societies divorce could be effected by the family in opposition to the wishes of the spouse concerned. This was especially so in the case of the wife. In some societies the wife's parents had the right to

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1. See further, above, Chapter VII. pp. 577-579.

2. Egharevba, Benin Law and Custom, op. cit., p. 20.

3. Bowen, op.cit., pp. 304-305; Ellis, Yoruba-Speaking Peoples, op. cit., p. 186.

4. See e.g. Begho, op. cit., pp. 49-50; Talbot, Peoples of Southern Nigeria, op. cit., p. 632; Meek, Northern Tribes of Nigeria, op. cit., p. 216; Talbot, Tribes of the Niger Delta, op. cit., p. 218.

remove her from the husband's home, and refund the dowry, without regard to the wishes of the wife. Fear of being deprived of his wife was a safe-guard against her ill-treatment by him, and an insurance of the performance by the husband of his customary obligations to the wife's family.[1]

B. The modern society.

The general rule which obtains in Nigeria at present is that a customary marriage may be legally dissolved by mutual consents of the spouses, or unilaterally by either spouse, whether the other spouse consents or not.[2] Grounds for divorce which have to be established by a wife may be more stringent, and some grounds, for example, adultery, may be entirely denied to a wife, but there are not many societies, even those where divorce was traditionally never permitted, which now prohibit divorce if both spouses desire it, or which deny the wife's right to a divorce, while permitting a husband to divorce his wife unilaterally.

This represents a great improvement in a wife's legal status in relation to divorce, and is in accordance with the general practice of the various communities in Nigeria.

There are, however, a few communities which continue to observe the traditional law under which divorce is absolutely impossible, or the husband's freedom to

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1. See Fadipe, The Sociology of the Yoruba, op. cit., pp. 76-77; Bascom, The Yoruba of Southwestern Nigeria, op. cit., p. 61; Ajisafe, Laws and Customs of the Yoruba, op. cit., p. 83; Tremearne, Tailed Head-Hunters, op. cit., p. 237; Meek, Northern Tribes of Nigeria, op. cit., p. 217.

2. See, Obi, Modern Family Law, op. cit., p. 366; Kasunmu Salacuse, op. cit., pp. 175-176; Nwogugu, Family Law in Nigeria, op. cit., p. 179.

initiate a divorce is denied to the wife, unless the husband consents.[1] For example, under Okrika customary law, an Iya (big dowry) marriage can be dissolved at will by the husband. All that he has to do is to return his wife to her parents. The wife can also divorce the husband provided he consents, but if he refuses to accept the refund of dowry and other marriage expenses, including the Ikpo and Okuru clothes he gave her at the time of the marriage, the marriage continues to subsist. There is nothing the wife could do to regain her freedom to remarry. Any children she subsequently begets for another man legally belong to the husband, but nevertheless are treated as illegitimate by the society.

In Solomon v. Gbobo,[2] the Port-Harcourt High Court held that such a custom was contrary to natural justice, equity and good conscience, and therefore unenforceable under section 20(1) of the High Court Law,[3] of the former Eastern Region.

This decision may be regarded as a blow struck for equality of rights and duties between the spouses of a customary marriage, and anticipated the right of freedom from discrimination of the new Constitution of the Federal Republic of Nigeria, 1979. One point should however be noted here. This was the decision of a High Court. Customary Court judges might have taken a very different view of the enforcement of traditional customary law. Resort to a High Court was only possible in this case, because Customary Courts were not in operation in the State at the relevant time. With the re-establishment of Customary Courts in all Southern States, discriminatory customary laws are less likely to be rejected as repugnant to equity and good conscience or contrary to the fundamental rights entrenched in the Constitution. While appeal to a Higher Court is possible, it is expensive, and beyond

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1. See Forde, The Yoruba-Speaking Peoples, op. cit., p. 28.

2. [1974]4 E.C.S.L.R. 457.

3. Cap 61, Laws of the Eastern Region of Nigeria, 1963 Revision.

the reach of most women.

Adherence to traditional customary law which adversely affects women is not confined to Customary Court judges. Some superior court judges are also prone to enforcement of customary laws which have been rendered ineffectual by changing social and other conditions. For example, in Nwaribe v. President and Registrar, Orlu District Court,[1] Egbuna J., cited with approval, and applied the following passage:

> Under ancient customary law marriage was almost always indissoluble, as it was looked upon as a permanent social and spiritual bond between man and wife on the one hand and their respective families on the other.[2]

The learned Judge failed to refer to the pertinent fact that this ancient law has been changed and that divorce is now prevalent in Nigeria society.

3. Divorce Procedures

A. The traditional society.

In traditional society, a marriage could be dissolved extra-judicially, and it was unnecessary for either husband or wife who wanted a divorce to resort to a court, or any other central authority.[3] In most cases, it was purely a family affair.

The procedures for obtaining a divorce differ in details in various communities, but general broad principles may, nevertheless, be identified, and may be

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1. [1964] 8 E.N.L.R. 24.

2. Ibid., p. 26; cited from Elias, Nigerian Legal System op. cit., p. 298.

3. See Obi, Modern Family Law, op. cit., pp. 363-365; Nwogugu, Family Law in Nigeria, op. cit., p. 178-179; Kasunmu and Salacuse, op. cit., pp. 172-175; Leith-Ross, African Women, op. cit., p. 103; Basden, Niger Ibos, op. cit., pp. 239-241; Meek, Law and Authority, op. cit., p. 279.

divided into four stages:

(i) separation of the spouses;

(ii) negotiations as to the amount of dowry, if any, refundable;

(iii) refund of dowry;

(iv) performance of symbolic customary rites, signifying the dissolution of the marriage.

Although the refund (or waiver of the liability to refund) of dowry is the only legal essential of a valid divorce,[1] the method by which the separation of the spouses is effected, and the performance of the customary rites, are not devoid of legal effect.

(i) Separation of the spouses. The first step towards a divorce is the physical separation of the spouses. The divorce may be initiated by either husband or wife, but there is a good deal of evidence which shows that, more often than not, it is the wife who initiates the divorce.[2] The first step towards a divorce may be accomplished verbally or symbolically. In the case of a wife who wishes to divorce her husband, in many cases, she simply collects her few personal property and returns to her natal family. In a few cases she may go directly and live with a prospective husband.[3]

Her initiation of divorce is usually accompanied by symbolic acts, some of them pregnant with legal consequences. For example, among the Ekoi (Ejagham), if a

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1. See further below, pp. 651-654.

2. See e.g. Bohannan and Bohannan, The Sin of Central Nigeria, op. cit., p. 77; Forde, Marriage and the Family Among the Yako, op. cit., p. 72; Fadipe, op. cit., p. 90; Kasunmu and Salacuse, op. cit., p. 177.

3. This is especially the case among the Yorubas, see Chawere v. Aihenu and Johnson, [1935]12 N.L.R.4; Obi, Modern Family Law, op. cit., p. 364; By Kalabari custom, if a woman wishes to leave her husband, she must beat the drum called Kpokpo round the town while stating her reasons, see Talbot, Tribes of the Niger Delta, op. cit., p. 216.

woman wished to divorce her husband, all she had to do was to rake out the fire, pour water on the embers till they died out, cover herself with white 'paint' and cut off her hair. After such a rite she could never return to her husband, even though both parties wished a reconciliation.[1] Similarly, a wife who, in a quarrel with her husband, uncovers her private parts and curses him, is thereby irrevocably divorced from him in some parts of Ibibioland.[2] These procedures may be compared with cases where the wife, perhaps after some disagreement with her husband, simply departs for her natal home. The husband if he wishes to do so, may follow her and effect a reconciliation.[3]

The husband may also initiate a divorce by a symbolic act indicating that he no longer wishes to remain married to his wife. Some of these acts terminate the marriage irrevocably, while others leave room for a reconciliation. For example, among some Ibibios, should the husband decide to terminate the marriage, he removes his wife's property from the house and throws them outside, or he may eject her physically and forcibly from his compound. Attempts at reconciliation may succeed and the wife be allowed to remain, after she has been fined for her wrong-doing. But if the husband places plaited palm leaves (ofut ekpo) outside the wife's hut or removes her cooking stand from the hearth, no reconciliation is possible, and the wife must leave his compound forever.[4]

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1. See Talbot, In the Shadow of the Bush, op. cit., p. 113; Talbot, Peoples of Southern Nigeria, op. cit., Vol. III, p. 674; Lieber, Efik and Ibibio Villages, op. cit., p. 23; Talbot, Tribes of the Niger Delta, op. cit., pp. 217-218; see also Thomas, Anthropological Report of the Ibo-Sheaking Peoples, op. cit., p. 17; Meek, Northern Tribes of Nigeria, op. cit., p. 217; Temple, Notes on the Tribes, op. cit., p. 251.

2. See Lieber, Efik and Ibibio Villages, op. cit., p. 23; see also Forde and Jones, The Ibo and Ibibio-Speaking Peoples, op. cit., p. 77.

3. Among some communities the husband has a duty to follow his wife and beg her to return, see Esenwa, op. cit.,p.73.

4. See Lieber, Efik and Ibibio Villages, op. cit., p. 23; Basden, Niger Ibos, op. cit., pp. 239-240.

Similarly, among some Igbo communities if the husband hands his wife the stick symbolizing his Ofo and asks her to return to her parents, this is enough to initiate a divorce. Among other sub-groups, the husband may ask the wife to bring him a basket. He then puts the broom with which the wife sweeps her house into it and tells her to take it and return to her parents. The husband thereby initiates a divorce.[1]

(ii) Negotiations for refund of dowry. Once it is conceded that reconciliation between the spouses is impossible or undesirable, the next step is for the spouses and their respective families to decide in a meeting the amount of dowry and other gifts which must be refunded by the bride's family to effect the divorce. Various considerations, for example, the number of children the wife has for the husband, the duration of the marriage, and the spouse who is mainly responsible for the break-up of the marriage are taken into account.[2]

(iii) Refund of dowry. The amount of dowry mutually agreed on by the families is refunded by the bride's family. Invariably this is done in a meeting at which both families, the spouses, the middleman and other witnesses are present. The elders of both families then declare the marriage dissolved.[3]

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1. See Aniogulu, "Aspects of Customary Marriage and Divorce and Their Incidents Upon Family Life", op. cit., p. 110; Talbot, Tribes of the Niger Delta, op. cit., p. 218; Lieber, Ibo Village Communities, op. cit., p. 17; Meek, Law and Authority, op. cit., p. 277-279.

2. See Bohannan and Bohannan, op. cit., p. 76.

3. See Customary Law Manual, op. cit., pp. 292-294.

(iv) Performance of customary rites. Among some communities, especially among the Igbos, certain ceremonies are performed to symbolize the severance of the marriage ties. For example, among some Igbo communities, the spouses hold two ends of a string, which is then cut, after which oaths are taken on behalf of the families of the spouses.[1] The tenor of such oaths is generally that each family will refrain from doing injurious acts to the other family. The oaths and ceremonies, although not legally essential for the validity of the divorce, nevertheless provide valuable evidence that the dowry has been refunded and a divorce effected, since in ordinary circumstances, the husband would refuse to perform the ceremony if the dowry agreed on has not been repaid.

B. Modern society.

In addition to extra-judicial divorce which prevailed in traditional society, judicial divorce to dissolve a customary marriage is now possible in most societies. In some communities, for example, the Yorubas, resort to a court to obtain a divorce has become institutionalised, so much so that some writers claim that a judicial divorce is now necessary in order to effect a valid dissolution of a marriage in Yoruba customary law. Thus Ekundare says:

> In Yoruba customary law, a proper dissolution of marriage is by the decree of the customary courts. The parties themselves have no legal right to grant themselves a divorce, though they could separate by agreement.[2]

It is respectfully submitted that in the absence of a statutory provision to this effect, this proposition

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1. See Customary Law Manual, op. cit., pp. 292-294 for the symbolic ceremonies performed by various Igbo communities.

2. Ekundare, Marriage and Divorce Under Yoruba Customary Law, op. cit., p. 29; cf. Kasunmu and Salacuse, op. cit., p. 175.

cannot be supported, with respect to the present practice among the Yorubas, at least at Ibadan. Undoubtedly a considerable number of disputes between the spouses are brought to the courts and are invariably recorded as divorce cases, but closer examination reveals that these cases nearly always involve incidental disputes. For example, the Grade B, Customary Court, No.4 at Mapo Ibadan recorded 1116 divorces cases decided in 1976. Of these cases 276 involved disputed paternity only, the spouses having mutually effected a divorce extra-judicially before instituting an action for affiliation in court. Many of the other cases were brought, either because the husband absolutely refused to divorce his wife and accept the refund of dowry, or more often, because he rejected the amount of dowry refund offered by the wife,[1] or in cases of divorce initiated by the husband, the wife refused to leave the matrimonial home; or having left to cohabit with another man, refused to refund the husband's dowry.[2] In some cases, the wife had refunded the dowry, but not the incidental payments and other gifts which had been expended or given by the husband with reference to the marriage. In other words, it is mainly divorce cases which involve incidental disputes which cannot be mutually settled by the

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1. The amount of dowry refundable is fixed by legislation, and in many cases, where the husband had paid a higher sum of dowry, he refused to accept the statutory amount, since before this legislation the whole amount of dowry paid was refundable when there was a divorce; see further, below, pp. 654-656.

2. See e.g. Raufu Alao v. Sherifatu Owero [1976] Suit No. 728/76, unreported, Ibadan Customary Court, Mapo. The husband claimed he had married the wife "in her maiden" (as a virgin). The wife allegedly removed to her parents' home, from where she married another husband, but failed to refund his dowry. The Court found that he had not actually paid dowry, although he had expended N70.00 on the occasion of the marriage. He was advised to bring a separate action to recover his marriage expenses. No dowry was refundable, since none had been paid.

parties that are brought to the courts for settlement.

This evidence was confirmed by the Judges of the Grade C, Customary Court, Agodi, Ibadan, who stated that it was not necessary to bring a court action for divorce if the parties could settle the matter amicably, and that the usual practice is for the prospective husband to refund the dowry to the previous husband, thereby simultaneously affecting a divorce, as well as a remarriage of the divorced woman to the man who refunded the dowry.[1] Consequently, the number of "divorce" cases brought to the Customary Courts reflects the number of cases involving incidental disputes rather than the number of actual divorces.

Among the other ethnic groups, judicial divorces are less frequent than among the Yorubas, and among the Igbos of Anambra and Imo States, where Customary Courts had been abolished, and were not in operation at the time field-work was conducted, non-judicial divorces were the rule rather than the exception. Very few divorce cases were brought to the Magistrates and High Courts which then had jurisdiction over customary marriages.[2]

It has been previously seen that a divorce could be initiated by either spouse of a customary marriage by a symbolic act which demonstrates the spouse's intention of bringing the marriage to an end. This procedure is still followed among certain sections of the community. For example, in a case[3] recently brought to the Welfare Office at Onitsha, the wife, married under customary law, alleged that she was "divorced" by her husband and left at her parents' home without any means of support for herself and

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1. Information given by the panel of Judges at an interview held at the Court on 7 Sept., 1977. The panel consisted of Acting President of the Court, B.O. Abidogun, Esq. and 4 other Judges. The Court Clerk acted as interpreter since no member of the panel spoke the English language.

2. See E.I. Nwogugu, "Abolition of Customary Courts - The Nigerian Experiment", [1976] J.A.L., p. 1; the abolition of Customary Courts was inconvenient for women who wished to divorce their husbands. See further above, Chapter VI, p.

3. File No. ONZ/SWU/12/5642/1976.

the infant children of the marriage. She stated that the husband bought a native pot and filled it with one gallon of palm wine. He told her to prepare to go with him to visit her parents. After exchanging greetings with her family, the husband calmly put two leaves from a pear tree into the wine he had brought with him, intimating that he had thereby divorced her. The husband waived his right to the refund of dowry. Consequently, the parties were, by the husband's act, legally divorced. It should be noted that the wife was divorced without any prior knowledge of her husband's intention to divorce her. She alleged that when they left for her parents' home she had no inkling of the husband's intention, and had therefore failed to remove her personal belongings from the matrimonial home.

This is a perfectly valid method of divorce among some Igbo communities, although where the husband has not waived his right to a refund of dowry, the marriage would not be regarded as legally dissolved until the husband's dowry has been refunded, usually by a prospective husband.[1]

Some High Court judges, while fully cognizant of the fact that the husband can effect an extra-judicial divorce by such a symbolic act, and a waiver of dowry, seem to forget that in most communities a wife has a similar right to an extra-judicial divorce, initiated invariably by a symbolic act, and a subsequent refund of dowry. Significantly, Aniagolu J., (as he then was) in his lecture, "Aspects of Customary Marriage and Divorce and their Incidents upon Family Life", delivered at The Workshop of African Indigenous Laws, held at the University of Nsukka in 1974, enumerated seven usual methods by which a husband could divorce his wife in the traditional society. The learned Judge failed to mention even one method by which a wife could divorce her husband,

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1. See Aniagolu, op. cit., pp. 109-110; Begho, op. cit., p. 53. Talbot, Tribes of the Niger Delta, op. cit., p. 218.

thus giving the impression that only husbands can initiate a divorce.[1]

In Re Briggs and Osagie,[2] Begho, J. stated:

> In these modern days with an abundance of customary courts, I would hold that to constitute a divorce, a person claiming to be a divorcee before a Registrar of Marriages must be able to show that he was granted divorce by a competent customary court.[3]

The Judge also held that the mere refund of dowry, in the manner alleged by the respondent,[4] could not constitute legal divorce. He accepted the evidence of the male caveator that to constitute legal divorce according to Beni customary law, an action had to be taken out in the Native Court, or the dowry had to be refunded at a meeting of both families. At such a meeting the husband would issue a receipt to discharge the woman from further obligations as his wife.

This decision has been criticized.[5] Customary law certainly knew no writing, and non-judicial divorce was common to most societies under traditional customary law. Customary law is not constant, but if the law has changed to the extent that judicial divorce, or a receipt for the refund of dowry is now required, in the absence of a statutory provision to this effect, it is doubtful whether the testimony of an interested party in a single case can be regarded as sufficient evidence of such a change.[6] Unfortunately, the alleged change was to the

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1. Aniagolu, op. cit., pp. 109-110.

2. [1964]M.N.L.R.95.

3. Ibid., p. 96.

4. The respondent alleged that she refunded the dowry directly to the husband.

5. See Nwogugu, Family Law in Nigeria, op. cit., p. 179; Kasunmu and Salacuse, op. cit., p. 174.

6. For the manner in which a change in customary law could be established see the judgment of Kingdon, C.J. in Balogun and Anor. v. Ashodi, [1931]10 N.L.R.36; see also Oshilaja v. Oshilaja [1972]10 CCHCJ11; see below, Chapter II, pp. 178-180.

disadvantage of the wife in this particular case.

In Okpanum v. Okpanum,[1] it was noted that dissolution of marriage under native law and custom can be extra-judicial. Agbakoba J., held:

> Under customary law no ground for divorce need be alleged nor proved. It was enough for the husband to arrange a meeting where he duly informed his parents-in-law of his intention to bring the marriage to an end... It does not often happen but it is lawful for a marriage to be terminated by mutual consent of husband and wife.

The Judge expressed the opinion that it was advisable to have recourse to the courts, not only to obtain a divorce which would then be a matter of course, but to determine and settle collateral questions in cases in which paternity of children, or refusal to accept the refund of dowry by the husband, or refusal by a wife to leave the matrimonial home after the husband had terminated the marriage, were involved.

Many communities have legislative provisions which make resort to a court necessary in order to terminate a customary marriage. Thus, The Efik Marriage Law[2] provides that neither husband nor wife could effect a divorce unless an action is brought in the Customary Court and a divorce bill granted. A similar provision is found in Benin Marriage Rules[3]. It is submitted that such provisions[4] represent a change in the traditional customary law which cannot be justified. Resort to a court or a receipt for the refund of dowry may be important as evidence of the fact that a divorce has taken place, but they never were, and should not now be made a legal essential of a valid divorce in customary law. Evidence of a divorce could be

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1. [1972]2 E.C.S.L.R.561, 565.
2. Section VI; these rules were drawn up by the Efik National Society in 1905, and are still followed by the Customary Court at Calabar, see further, below, p. 645.
3. Section II; these rules are applied locally in the Benin Area and are issued as amendments to the Native Court Instructions, see CC.47/Vol.2/17, Customary Courts Registry, Benin Division Benin City, 12 Aug., 1963.
4. For similar provisions see Section 5(2) of the Native Authority (Declaration of Tiv Native Law and Custom) Order 1955. (N.R.L.N.149 of 1955); section 9 of the Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order, 1959 (N.R.L.N.63 of 1959).

effected by a simple method of registration similar to the registration of a customary marriage, a birth or a death.[1] Compulsory resort to a court in order to dissolve a customary marriage, even where it is applicable to both parties in law, in actual fact, discriminates against the woman. A husband married according to customary law is not prevented from contracting further marriages, but the wife is unable to do so. The husband therefore has no need to initiate divorce proceedings in order to remarry. The wife who wishes to remarry must obtain a divorce. This is the main reason why most divorces are initiated by women.

To bring an action even in the Customary Courts, costs money, and may be an added financial burden to a wife struggling to accumulate enough funds to repay the dowry. The costs of bringing an action may be higher than the dowry to be refunded. The modern trend in many countries is to make divorce procedure as simple as possible. Customary law has always provided the simplest procedures. There is no justification for the reversal of this principle of customary law.

4. GROUNDS FOR DIVORCE

A. The traditional society.

Strictly speaking, no "grounds" for divorce, in the technical sense of an obligation to establish facts which in law would justify a grant of divorce, were necessary for the dissolution of a customary marriage in traditional customary law. Divorce was an extra judicial matter in all societies, and could be effected by either spouse, for the simple reason that he or she no longer wanted to continue the marital relationship. If such a desire was evinced, and all attempts at reconciliation

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1. See e.g. The Kalabari Council Registration of Marriages, Bye-Laws, 1965, E.N.L.G. No.1 of 1966.

proved fruitless, divorce would ensue, in spite of the fact that no serious matrimonial offence had been committed by the other spouse.[1]

The position could be contrasted with English law where, until recently, a divorce could only be obtained if the party seeking a divorce justified a grant by proving the commission of at least one of a number of specific enumerated offences. Divorce by mutual consent was impossible. In traditional customary law, (as it now is under English law, and under the Nigerian Matrimonial Causes Decree),[2] the only ground for divorce was irretrievable breakdown of the marriage. Once this stage was reached, the cause of the breakdown was immaterial, serving only as evidence of the fact that the marriage had indeed broken down.

The burden of a spouse wishing to justify a divorce was to convince the families, (especially his or her own family) - the chief arbiters in matrimonial disputes, that the marriage had indeed broken down. It has been seen that the families of the spouses took an active part in the formation of a customary marriage. Similarly, they also took an active interest in the stability of the marriage. This was especially so in the case of the wife's family.

In many systems of customary law, dowry paid by the husband on the occasion of the marriage had to be refunded to him immediately, by the wife's family, when the marriage is dissolved. The wife's family, therefore, had an economic, as well as a social reason, for ensuring that the marriage remained intact. A wife who wished to leave her husband must be able to marshall convincing

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1. See Kasunmu and Salacuse, Nigerian Family Law, op. cit., pp. 175-176; Obi, Modern Family Law, op. cit., pp. 366-368; Nwogugu, Family Law in Nigeria, op. cit., pp. 181-182; cf. the position in Sierra Leone, see Olive P. Taylor, "The Position of Women Under Sierra Leone Customary Family Law", in African Indigenous Laws, edit. by T.O. Elias, et al. (Enugu: Government Printer, 1975), pp. 194-231, at p. 225-226.

2. See further, below, Chapter XI, pp. 258-260.

reasons for doing so.[1]

It has been mentioned previously that the main tribunal for domestic disputes was a meeting of the families concerned, higher authority only being referred to when no settlement could be arrived at, and the peace of the community or village was threatened as a result.[2] The spouse who desired a divorce would therefore be anxious to satisfy, not only his or her family, but the community as a whole, that a divorce was justified. This was necessary, in order to enlist the support of the family, and the sympathy of the community, against any action taken by the other spouse. If it is remembered how important a part the sanction of a community plays in the enforcement of law in traditional society, the importance of enlisting the sympathy or active support of the community as well as the family would readily be appreciated.

Among the usual reasons generally acceptable as sufficient to justify one spouse leaving the other were:

(i) adultery by the wife;
(ii) sterility of either spouse;
(iii) cruelty of either spouse (but especially the husband);
(iv) desertion;
(v) persistent stealing by either spouse;
(vi) the practice by either spouse of witchcraft, making poisonous medicines or other potions, with an intention to harm the husband, a co-wife, or her children;
(vii) failure to give respect to the senior members of the other spouse's family (especially in the case of the wife);
(viii) refusal of either spouse to have sexual intercourse at reasonable intervals; and

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1. See Aniagolu, op. cit., p. 111; Delano, An African Looks at Marriage, op. cit., p. 31.

2. See above, Chapter V.

(ix) failure by the husband to honour his customary obligations to the family of the wife.

Some of these reasons will be briefly discussed.

(i) Adultery[1]

In most systems of customary law, if adultery was committed by the wife, the husband had the option of divorce,[2] which did not exclude his right to claim damages from the male adulterer, and in some societies also from the adulterous wife.[3] It has been previously seen,[4] that in most societies a wife had no exclusive rights to her husband's sexuality, and consequently a wife was denied a corresponding right to divorce her husband on account of his adultery, or to claim damages from a female adulterer.[5] The right of a husband to claim damages from persons committing adultery with his wife was grossly misused and had to be limited or abolished in some areas of the country, for example, among some Igbo communities.[6]

Divorce for adultery is rare[7] in traditional

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1. Adultery has been discussed previously in Chapter VII above. Its treatment here refers solely to adultery as a ground for divorce.

2. See Ellis, The Yoruba-Speaking Peoples, op. cit., p. 186; Obi, Modern Family Law, op. cit., p. 367; Nwogugu, Family Law in Nigeria, op. cit., p. 181; Aguda, Select Law Lectures and Papers, op. cit., p. 75.

3. Example, among the Yorubas, Ibibios and some Igbo communities, see Customary Law Manual, op. cit., pp. 278-282; see Delano, An African Looks at Marriage, op. cit., p. 31, who excludes adultery from his list of grounds for divorce.

4. See above, Chapter VII, pp. 564-565.

5. But see Forde and Jones, op. cit., p. 18 who include adultery as a ground for divorce by a wife; see also the Customary Law Manual, op. cit., p. 291; adultery by a wife is not a ground for divorce in Ukwa Division of Imo State; cf. Elias, op. cit., p. 299; Aguda, op. cit., p. 75; Obi, Modern Family Law, op. cit., p. 367. Delano, An African Looks at Marriage, op. cit., p. 31.

6. See Iepowa Adebiyi, "A Short History of Brass and Its People", J.R.A.S., Vol.7, 1907/1908, p. 60; Basden, Niger Ibos, op. cit., p. 233.

7. See Bohannan and Bohannan, The Tiv of Central Nigeria, op. cit., p. 77; Ellis, The Yoruba-Speaking Peoples, op. cit., p. 186. Nadel, Black Byzantium, op. cit., p. 152; Temple, op. cit., p. 43.

society and is only resorted to if the adultery is habitual or aggravated,[1] or if the guilty wife refuses to perform the propitiatory customary sacrifices necessary to cleanse the pollution, and to appease the Gods.[2] In Odu Kalu v. Odah Odu,[3] the husband discovered his wife committing adultery on his bed. He requested her to buy two goats and to return to their hometown to perform the necessary sacrifice to their juju. Unless this sacrifice was performed, the husband claimed that he was forbidden to eat food cooked by her. The wife at first refused his request to perform the sacrifice but was persuaded to do so when he gave her £6 for the purpose. She went home and performed the sacrifice. On her return to Calabar, where the couple had their matrimonial home, however, instead of joining her husband, she went to live with the man she had been caught committing adultery with. She later delivered a female child for her lover. The husband sued her for damages for adultery. The Calabar Customary Court ordered her to pay £20 compensation to him as damages for aggravated adultery.

(ii) Sterility

Generally, it can be said that in most systems of customary law the husband's sterility would justify a divorce by the wife.[4] In some societies, the husband's

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1. For example, adultery with a husband's blood relation, see Johnson, History of the Yorubas, op. cit., p. 116; cf. Talbot, Peoples of Southern Nigeria, op. cit., Vol. III, p. 712: "Amongst nearly all tribes, for a woman to cook food for her husband when she has just returned from committing adultery is looked upon as a very grave sin, and it is specially heinous should the connection take place while it is being cooked; in such cases it is thought that the husband will probably die". See further, above, Chapter VII, pp. 565 et al.
2. See Thomas, Anthropological Report of the Ibo-speaking Peoples, op. cit., Part IV, pp. 75-78.
3. [1963] Suit No. 533/63, unreported, Calabar Customary Court.
4. See e.g. Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958, W.R.L.N. 456 of 1958.

sterility was the chief ground available for divorce by a wife,[1] and in nearly all societies, a woman was justified in either divorcing her husband, or giving him spurious children. For example, among the Tiv, it is not adultery if illicit sex by the wife is for the purpose of procreation. The word for adultery (idiar) in Tiv language is the same as that for sexual passion.[2] Similarly, among the Ibusa community of Igboland, if a wife is not pregnant within four months of marriage, customary law allows her to return to her father's home to have sexual intercourse with any of her male friends.[3]

Although Obi and other writers mention impotence of a husband as a possible ground for divorce,[4] it is submitted that in Nigeria, impotence is confounded with sterility. In traditional society, provided a husband can impregnate his wife, his sexual potency is regarded as irrelevant. Similarly, a potent but sterile husband may be divorced by his wife. There are a few cases where the husband's sterility was allegedly the reason for his wife seeking a divorce.[5]

The importance of children in traditional society cannot be over-emphasized. There is no evidence, however, that either husbands or wives were divorced because of their sterility alone. If the husband is sterile, the wife is permitted to produce children by other men.[6] In

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1. See Talbot, Life in Southern Nigeria, op. cit., p. 211; Young girls just out of the fatting-house hope to become mothers within a year of marriage and, by native law can claim divorce from a husband who proves incapable of fulfilling their wish within that time; cf. Dennett, Nigerian Studies, op. cit., pp. 166-167.

2. Bohannan, Justice and Judgment Among the Tiv, op. cit., p. 80; see also Leith-Ross, African Conversation Piece, op. cit., p. 71.

3. See The Customary Law Manual, op. cit., p. 367; Ezeife, The Sociology of Ibusa, op. cit., p. 39.

4. See Obi, Modern Family Law, op. cit., p. 366; Talbot, Tribes of the Niger Delta, op. cit., p. 216; cf. Fadipe, op. cit., p. 90, who notes that impotence was usually not a cause for divorce among the Yorubas.

5. See e.g. Evoroja v. Evoroja and Anor. [1961] W.N.L.R. p.6.

6. See Forde and Jones, op. cit., p. 18; The Customary Law Manual, op. cit., p. 272; Basden, Niger Ibos, op. cit., p. 241; Thomas, Anthropological Report on the Ibo-Speaking Peoples, op. cit., p. 67.

some communities the husband's consent or knowledge is unnecessary for this purpose,[1] but in most communities, such a course is usually initiated by the husband's family with his consent.[2] If, on the other hand, it is the wife who is sterile, the husband was free to marry further wives and often did so with the financial help of his sterile wife. In this manner, the wife compensated for her disability by her economic contribution, and thus averted a divorce.[3]

(iii) Cruelty

Under traditional customary law, a husband had the right to beat his wife. The beating had to be done, however, in a reasonable manner. Any treatment which was regarded as unreasonably cruel would result in the wife being removed from the matrimonial home by her family.[4] Delano notes:

> In the olden days, when women were considered as the property of the husband, divorce was rare by the woman and only obtained for barbaric and brutal cruelty. In such a case a woman had the right to hold on to the pillars of the King's palace. A husband could not touch her there.[5]

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1. See Customary Law Manual, op. cit., p. 273; the husband's consent is not required in Arochukuri, Awgu, Bende, Idemili, Mbaise, Nkanu, Northern Ngwa, Nsukka, Oru, Ukwa and Umuahia Divisions.
2. See Thomas, Ibo-Speaking Peoples, op. cit., Part IV, p.67; Manual of Customary Law, op. cit., p. 367; Gunn and Conant, Peoples of the Middle Niger, op. cit., p. 44; Fadipe, op. cit., p. 91.
3. See Delano, An African Looks at Marriage, op. cit., p. 27; R.N. Henderson and H.K. Henderson, An Outline of Traditional Onitsha Ibo Socialization (Ibadan: Nigeria; Ibadan University Press, 1966), pp. 12 and 14; and further above, Chapter III, pp. 243-244.
4. Bohannan and Bohannan, The Tiv of Central Nigeria, op. cit., p. 77; Thomas, Report on the Ibo-Speaking Peoples, op. cit., Part I, p. 69; Johnson, History of the Yorubas, op. cit., p. 116, who notes that "a woman may apply for divorce for extreme cruelty".
5. Delano, The Soul of Nigeria, op. cit., p. 142.

The husband's right of chastisement was sometimes misused by thoughtless and cruel husbands. Talbot's wife records a particularly horrific instance of man's inhumanity to woman. She recounts a case where, in order to extract an adultery confession from his wife whom he suspected of infidelity, the husband

> ... tied her hands firmly to two stakes firmly driven into the ground and so far apart that she lay with arms extended as if crucified. He then proceeded to torture her by forcing native pepper into her eyes and in other ways, which, though recounted in Court as mere matters of everyday occurrence, are such as it is impossible to describe. Yet the man only acted within the rights given him by the law and custom of his tribe.[1]

The writer attributed the cruelty of Ibibio husbands to the fact that "many husbands still regard their wives as mere chattels".[2]

It is doubtful whether such a high degree of cruelty was lawful in traditional Ibibio society. Although adultery by a wife was generally regarded as a serious offence which often produced illness in the husband, evidence obtained from older informants among the Ibibios indicates that the usual penalty meted out to adulterous wives was not unduly severe. More importance was attached to the purification rites which had to be observed in order to cure the effect of the adultery, than to the punishment of the female adulterer.[3]

With regard to the mental element, although the idea of women being regarded as property cannot be ruled out as a reason for the husbands' cruelty,[4] there is

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1. D. Amaury-Talbot, Woman's Mysteries of a Primitive People, op. cit., p. 98.
2. Ibid., p. 98.
3. See further above, Chapter VII. pp.565-568.
4. See Tremearne, Tailed Head-Hunters, op. cit., p. 231; Leith-Ross, African Women, op. cit., p. 125.

evidence of gross cruelty by husbands in societies where wives are not regarded as property. For example, in a letter written to Erin Pizzey, founder of a home for battered English wives, in 1971, a wife described the cruelty of her husband:

> He kicked me, stood on me, punched me and throttled me into insensibility time and again. I don't know if this was the cause but our child was born blind and mentally retarded ... it is incredible that one person can treat another so diabolically. He smashed my toe with a hammer one night and I didn't dare tell the hospital.[1]

Another battered English wife reported that the last time her husband beat her

> he smashed her head against the wall in the passage until she was unconscious, and then pushed her head under the cold tap in the scullery until she came round, and then banged her head against the wall again.[2]

These are only two of a catalogue of cruelties perpetrated by English husbands in a society where at least in legal theory, the legal rights of men and women are almost identical, and where assault on a wife is a criminal offence. It is evident that cruelty of husbands, and indeed of wives in a few cases, does not arise merely from the mental attitude of proprietorship.

(iv) Desertion

Desertion in English law consists of the unjustifiable withdrawal from cohabitation, without the consent of the other spouse and with the intention of remaining separated permanently. The separation may be actual, as when one spouse leaves the matrimonial home to live elsewhere without the consent or approval of the other with an

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1. Erin Pizzey, Scream Quietly or the Neighbours Will Hear, (London: Penguin Books, 1974), pp. 22-23.

2. Ibid., p. 19.

intent to remain separate, or constructive, that is, where one spouse behaves in such a way that the other is justified in leaving the matrimonial home, the former is in law, in desertion.[1]

Both types of desertion are found in customary law, but in traditional society it was very rare for a husband to desert from the matrimonial home in patrilineal societies, or in societies where the spouses cohabited in the husband's family compound.[2] In most cases, the wife was the deserter, since invariably she returned to her own family when she found it impossible to live with her husband. It was possible, however, for the husband to be, and in many cases husbands actually were, in constructive desertion, by withdrawing from any marital relationship with the wife, and by their actions indicating that the marriage was at an end, without actually divorcing her. Such behaviour was usually actuated by fear of losing the refund of dowry if they initiated a divorce.[3]

B. The modern society

The position with reference to grounds for divorce

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1. See further, Bromley, Family Law, op. cit., pp. 194-213; see also Pulford v. Pulford [1923]P.18 at pp. 21: "in order to ascertain whether there has been desertion, you must look at the conduct of the parties ... Desertion is not the withdrawal from a place, but from a state of things"; see Tinubu v. Tinubu [1959] W.R.N.L.R.314; where the petitioner married the respondent without her father's consent and went to live with her father for seven years before returning to live with the respondent when her father failed to give his consent to the marriage, was held to be constructive desertion.
2. Obi, Modern Family Law, op. cit., p. 227; Nwogugu, Family Law in Nigeria, op. cit., p. 182.
3. For grounds of divorce in customary law generally, see Forde, et al., Peoples of the Niger Benue Confluence, op. cit., p. 44; Forde and Jones, The Ibo and Ibibio-Speaking Peoples, op. cit., p. 18; Obi, Modern Family Law, op. cit., pp. 366-368; Tremearne, op. cit., p. 237; Esenwa, Marriage Customs in Asaba Division, op. cit., p. 75; Fadipe, op. cit., pp. 90-91; Delano, An African Looks at Marriage, op. cit., p. 31.

remains basically the same in modern Nigerian customary laws as it was in traditional society, especially in the case of extra-judicial divorce. All of the reasons given above as justifying divorces in traditional Nigerian society remain valid as "grounds" for divorce in contemporary Nigeria, except where local authorities' bye-laws provide to the contrary. It may be noted in this respect that Lord Lugard, in his Political Memoranda, advised that the grounds for divorce in customary marriage should not be based on English standards.[1] The fact that a divorce in a statutory marriage could only be obtained by the establishment of a few precise grounds, was, and still is, one of the chief reasons for the unpopularity of statutory marriages in Nigeria.

Strictly speaking, no reasons need to be advanced for extra-judicial divorce of a customary marriage in contemporary Nigerian society. Families no longer strive to preserve marital stability, and a wife has a greater measure of freedom to dissolve her marriage than she usually had in traditional society.

A few local authority bye-laws now provide specific grounds which must be proved by a spouse before he or she may be granted divorce in a customary law marriage. Many of these provisions discriminate against women. Thus they all provide that the wife's adultery is a valid ground for a divorce claimed by a husband. The husband's adultery, however, is not a valid ground for divorce instituted by the wife. There is a concerted attempt to define adultery as an act which may only be committed by a married woman with any man. For example, the Gold Coast Marriage Ordinance provides:

> Adultery shall not be held to include the intercourse of a man married by native customary law with an unmarried woman.[2]

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1. See Lugard, Political Memoranda, op. cit., p. 84.
2. Gold Coast Marriage Ordinance, 1884, S.49(2). This provision was added to the Ordinance in 1909.

This provision discriminates not only against customary law but also against married women.

Similarly, Ellis notes: "Adultery can only be committed with a married woman".[1] Marris lists the most common causes of marital instability among his interviewees in Lagos as, "a wife's jealousy, her adultery, or the financial failure of the husband".[2] The husband's infidelity is expressed in terms of the "wife's jealousy", but her infidelity is "adultery". The fact that customary law permits polygyny is no justification for the discrimination. A husband should be guilty of adultery if he has illicit sexual intercourse with women other than his legally married wife or wives.[3]

Other discriminatory bye-laws include:

(a) The Efik Divorce Law.

In 1965, the Efik National Society drew up rules pertaining to Efik Marriage Law which were to be observed by Customary Courts within the area of jurisdiction. These rules were reprinted with alterations in 1918, and are currently used by the Customary Courts in Calabar. The section dealing with divorce provides:

1. The misconducts of a wife entitled a husband to a dissolution of marriage are as follows:
   (a) Adultery (sexual or non-sexual);
   (b) Theft;
   (c) Making charms for her husband with intent to do harm;
   (d) Drunkenness, to disgrace herself;
2. The misconducts of a husband entitled a wife to dissolution of marriage, are as follows:-

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1. See Ellis, The Yoruba-Speaking Peoples, op. cit., p. 186.

2. Marris, op. cit., p. 50.

3. This is the position under the Penal Code Law, Cap. 89 Laws of the Northern Region of Nigeria, 1963 Revision, S. 387, where adultery is treated as a crime.

(a) Brutally assaulting his wife;

(b) Not providing for his wife;

(c) Theft;

(d) Making charms for his wife with intent to do harm.

Non-sexual adultery is defined as:

1. Playing, through love, with another man's wife.
2. Keeping secret friendship with another man's wife.
3. In the way of love, giving another man's wife any dash or present.
4. In the way of love, touching another man's wife in any part of her body, such as shaking hands or touching the breast etc. etc.

There is no provision entitled a wife to a divorce on the ground of her husband's adultery. The divorce rules as stated above attempt to enforce morality on a community solely at the expense of one sex, and the number of divorce cases involving alleged adultery by wives brought to the Customary Court at Calabar testify to their failure.

(b) The Ibadan Marriage, Divorce and Custody of Children Bye-Laws 1965.

The Bye-Law sets out the grounds on which a divorce may be granted. In the case of the husband, conviction for a crime involving a sentence of at least five years imprisonment may justify divorce by a wife, but a husband may be granted a divorce if his wife is convicted of a crime involving a sentence of more than three years imprisonment.[1] The Ibadan Bye-Laws provide that a wife may be granted a divorce on the ground of her husband's adultery. This provision illustrates the high legal status of Ibadan women, but the importance of the provision is somewhat diminished by the fact that Judges in Ibadan Customary Courts grant a divorce as a matter of course, once the marriage has broken down irretrievably. None of the cases examined by the present writer involved a wife's claim for divorce on the ground of her husband's adultery. The wife's adultery was alleged in numerous divorce suits

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1. S.6(d) and 7(c).

brought by husbands.

(c) Biu Native Authority Declaration.

A few of the local authorities in the Northern States have issued rules governing divorce. Some of these rules reflect Islamic divorce laws which are heavily biased against women. For example, section 8 of the Biu Native Authority (Declaration of Biu Native Marriage Law and Custom) Order, 1964 provides that a husband and wife shall be deemed to be divorced:

> (a) upon the granting of a divorce by a court on the application of either husband or wife; or
> (b) upon oral repudiation of his wife by the husband in her presence before two adult male witnesses of full capacity; or
> (c) upon repudiation of his wife by the husband in writing signed by himself and dated.

Thus extra-judicial divorce available to the husband is denied to the wife, which is obviously discriminatory against the interest of women, and contrary to the 1979 Constitutional provision which guarantees freedom from discrimination on the ground of sex.

Similar discriminatory provisions are found in other local written customary laws.[1]

C. Grounds for judicial divorce.

Where there are local bye-laws which provide specific grounds for divorce, judges are constrained in their jurisdiction to grant a divorce. In the absence of

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1. See e.g. The Benin Marriage Rules, op. cit., S.2, which provides: "No divorce can be granted under any circumstances where it is proved that the woman is pregnant until the child is born and shown to the Native Court for settlement of guardianship". The husband's right to remarry is unrestricted. See also the Declaration of Borgu Native Law and Custom Relating to Marriage and Divorce, N.A.L.N. 52 of 1961, S. 7(2) which has a similar provision.

such provisions what are the grounds on which a judicial divorce is granted?

Examination of decided cases at Ibadan and Calabar Customary Courts, where there are written rules providing specific grounds for divorce, and at Eket Customary Court, and the Magistrates Courts in Nsukka, Enugu and Onitsha, where there are no written rules, reveals a consistent practice - judges invariably grant a divorce on whatever ground or grounds the petitioner alleges.

The most frequent reasons for which divorces were granted to female petitioners include cruelty, "lack of care" (which includes lack of maintenance); polygyny, most often expressed as inability to live amicably with the other wife or wives of the husband, or an allegation that the husband loves one wife more, or treats her better than another. In a few cases wives claimed, and were granted, divorce on the husbands' alleged disrespect to members of their families.

In the cases of male divorce petitioners, the wife's adultery is a common complaint. More than sixty percent of divorce cases brought by husbands in Ibadan and in Eket, Customary Courts, included allegations of adultery. Other grounds included "waywardness", translated as failure to obey the husbands' lawful orders, disrespect to the husband or his relatives,[1] and surprisingly, cruelty.

A few of the many cases involving alleged cruelty of wives may be usefully given here as an indication of the status of women in contemporary Nigeria.

In Olufemi Adedeji v. Aduke Adedeji,[2] the petitioner, a baker by trade, complained that his wife broke a bottle of stout over his white lace agbada (Yoruba native suit), after which she threw a gallon of baking oil on his head. The wife, whom he had seduced from her

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1. See e.g. Tommy Orpo v. Grace Charlie [1972] Suit No 276/72/8360, unreported, Eket Customary Court, 22 June 1972.

2. [1976] Suit No. 729/76, unreported, Customary Court, Grade B, Mapo, Ibadan.

previous husband eleven months previously, admitted throwing the gallon of oil on the petitioner, but she alleged that she did so because he was trying to push her into a hot oven. A divorce was granted in spite of the wife's opposition to the grant.

In Taiwo Alotu v. Janet Adekunle,[1] the husband petitioner alleged "gross cruelty" and "domestic persecution" by his wife. He claimed that after he had separated from his first wife after some disagreement, he married the defendant. As a result of his father's intervention, reconciliation with his first wife who had borne two children by him, was effected. As a result the second wife, the defendant, became angry. She allegedly cursed him everyday and on several occasions she beat him and locked him in his room. She also frequently went to his office to fight with him. In fact, it was on one of these occasions when she went to attack him in his office that the divorce petition was served on her.

The petitioner in Friday Bassey v. Eduah Isich[2] alleged a series of cruelties against his wife. He claimed that on one occasion his wife beat him without any just cause and wounded him with an elephant carving, which left his finger deformed.

These are just three of the many cases which illustrate the fact that Nigerian wives today are not docile partners in the marital relationship.[3]

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1. [1974] Suit No. 311/74, Civil Record Book, Vol.25, unreported, Customary Court, Grade B, Mapo, Ibadan.

2. [1972] Suit No. 43/72, unreported, Eket Customary Court, 2 Feb., 1972.

3. For reported cases involving physical cruelty of wives see: Abisuga v. Abisuga [1974] CCHCJ.819, in which the husband needed hospital treatment several times due to his wife's cruelty; Adeyemi v. Adeyemi [1969]2 ALL N.L.R. 181 - the Judge described the wife's alleged cruelty as "stranger than fiction"; Akponor v. Akponor - [1974] 7CCHCJ 1047 - the wife had a proclivity to draw a knife on the husband whenever there was a dispute; Williams v. Williams [1976] 3CCHCJ.805.

In spite of the definition of express grounds for divorce, decided cases in Ibadan and Calabar reveal few cases in which a divorce was not granted. Some feeble efforts were made to reconcile the spouses, especially at Eket and Calabar, but in most cases divorces were granted as a matter of course. The judges seem to regard a marriage as having irretrievably broken down once it had reached the courts.

The only case where a divorce was not granted was decided in Eket Customary Court.[1] The husband in this case petitioned for a divorce on the grounds of adultery, disrespect shown to his mother[2] by the wife, and cruelty. The parties were married for nineteen years and had six children. The wife objected to a grant of divorce on the ground that she was unable to care for the children on her own. The Judge said:

> The issue of the children is very important in this case. It is observed that the custody of children is always in the mother's care. The defendant should learn a lesson to always maintain peace and to show some sign of respect in view of the children.

He ordered the spouses to remain as husband and wife for the period of one year to allow the defendant to show some signs of improvement in her behaviour.

Such decisions are, however, few.

It is submitted that, despite laws to the contrary, issued by the various Local Authorities, restricting the grant of divorce to specific grounds,[3] this approach of the Customary Court judges to an action for divorce, is the

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1. See Friday Bassey v. Eduah Isich [1972] Suit No. 43/72, unreported, Eket Customary Court.

2. cf. Anakwenze v. Anakwenze [1972] 2E.C.S.L.R. where the husband accused the wife of "insubordination laxity and disrespect".

3. The Efik Marriage Law imposes a fine, or not more than two months imprisonment on a spouse who, without sufficient grounds, insists on obtaining a divorce after a decree of judicial separation observed for six months.

correct one, since it is consonant with the actual practice of the people. Evidence collected during field-work, even in the most rural areas, indicate that parties to a marriage separate when the marriage relationship has become intolerable to one or both of them. Older people bewail the present instability of marriage compared with their own times, but everyone recognizes the fact that marriage is no longer regarded as indissoluble. The reasons why a marriage has broken down have become increasingly irrelevant. Refusal to grant a divorce, which affects women in particular adversely, since they cannot remarry without such divorce, (whereas the husbands can), will not protect the sanctity of marriage. It merely encourages concubinage.

5. The Refund of Dowry on Divorce.

A. Introduction

It has been previously mentioned that refund of dowry, or its waiver by the husband is legally essential to a valid divorce in most systems of Nigerian customary law, whether the marriage is dissolved extra-judicially by mutual consent of the parties or by a court.[1]

The spouses may separate and live apart from each other for years, but provided the dowry has not been refunded they are still legally married, and certain incidents of marriage, notably affiliation of children, continue to exist.

Refund of dowry is an important aspect of the legal status of women in marriage, since it is the sine qua non, and in many societies, the only legal essential of a valid divorce, especially in modern Nigeria where less importance is attached to rituals. Failure to refund the dowry can adversely affect a woman and the children she bears for another man subsequent to separation from her husband. This aspect of the problem has been discussed

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1. See further above, Chapter VI, pp. 457-464; see also Leith-Ross, African Women, op. cit., p. 103; Childs, "Christian Marriage in Nigeria", op. cit., p. 243.

previously. In this section certain legal questions relevant to the refund of dowry and other payments made on the occasion of a marriage by the husband or on his behalf, to the bride's family, when a marriage has broken down irretrievably, will be examined.

The following topics will be briefly discussed:

(i) the legal effect of a refund of dowry;
(ii) the amount of dowry refundable;
(iii) responsibility for the refund of dowry;
(iv) the time at which a refund is due.

B. The traditional society

(i) The legal effect of a refund of dowry.

In most communities in Nigeria refund of dowry legally dissolves a marriage according to customary law, although certain rituals symbolising the severance of the marriage ties between the spouses and their respective families are considered important and are invariably performed in certain communities. The rituals provide valuable evidence of divorce, but are mainly religious in nature.

Once the dowry, or an agreed portion of it is refunded, or refund is waived by the husband or on his behalf in traditional society, the marriage is legally dissolved and all legal incidents of the relationship ceases.[1] Meek notes that even where elopement and wife-stealing are recognized modes of obtaining wives, the wife's abductor usually ends the wife's former marriage by refunding to the former husband all marriage payments the latter had made with reference to the marriage.[2]

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1. See generally, Obi, Modern Family Law, op. cit., p. 368; Tremearne, op. cit., p. 237; Begho, Law and Culture, op. cit., p. 50; Meek, Northern Tribes of Nigeria, op. cit., p. 215; Temple, Notes on the Tribes, op. cit.

2. Meek, Northern Tribes of Nigeria, Vol. 1, op. cit., pp. 215-216.

An Onitsha informant stated that according to Onitsha customary law, divorce by refund of dowry is irrevocable in the sense that the former spouses are prevented from ever remarrying. If, however, dowry has not been refunded the couple are free to settle their differences, regardless of the fact that they may have led separate lives for a number of years. He cited the case of a couple who had lived apart for more than sixteen years. During the Nigerian Civil War, they met accidentally in a village away from their hometown, where they had both gone to seek refuge. A reconciliation was effected. It was claimed that this reunion would have been legally impossible if dowry had been refunded, when no further marriage between the couple would have been legally possible.[1]

All Onitsha informants agree that refund of dowry is necessary for a valid divorce, and it is very unusual for a husband in traditional society to waive refund of dowry. It is interesting to note that where a couple have contracted a customary marriage, as well as a statutory marriage, and the statutory marriage has been dissolved by a court of competent jurisdiction, Onitsha people still regard the couple as married if dowry has not been refunded. According to them, all the legal incidents of the marriage subsist.

If dowry is not repaid, the woman is still considered a wife,[2] and if she dies, her natal family must seek the husband's wishes as to the disposal of her corpse. He could insist that her corpse be brought back for burial in his own village, if he so wishes. If the husband dies, she has to perform all the burial and mourning ceremonies imposed on a widow.[3] During field work the present writer

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1. Cf. the Manual of Customary Law, op. cit., p. 306, p. 306, which states that a man and woman whose marriage was dissolved by divorce are free to remarry if they so desire. Opinions in Onitsha were divided on this issue.

2. See Fadipe, op. cit., p. 91; Odje, Laws of Succession in Southern Nigeria, op. cit., p. 316; cf. Thomas, Anthropological Report of the Edo-Speaking Peoples, Part 1, p. 70.

3. See further below, pp. 690-694.

interviewed a woman whose husband had just died. The couple had been separated for twenty-three years. She had left him because of extreme ill-treatment and neglect. The head of her family insisted that she should not perform any mourning ceremonies for the deceased husband, since the husband had made no attempt at reconciliation for all those years. Everyone, however, conceded that the action of the head of the family, although justified in this extreme case, was against Onitsha customary law.

These cases demonstrate the need for dowry to be repaid if a valid divorce is to be effected.

There are some exceptions to the general rule that a refund of dowry is essential for a divorce. An obvious example is where no dowry had been paid with reference to the marriage. Thus, in a marriage by mutual consent only,[1] since dowry has not been paid, no refund has to be made to effect a divorce. In a marriage by exchange, the union is dissolved by return of the woman given in exchange.[2] There are some societies, however, where refund of dowry is not essential for the dissolution of the marriage by divorce,[3] especially where the husband has been responsible for the break-up of the marriage.

(ii) The amount of dowry refundable

The amount of dowry and other marriage payments refundable on a divorce varies from community to community. In some communities, the entire dowry paid, as well as the pre-marriage gifts, are refundable on a divorce. In other

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1. See further above, Chapter III.

2. See Bohannan and Bohannan, The Tiv of Central Nigeria, op. cit., p. 76; Meek, Northern Tribes of Nigeria, op. cit., p. 215.

3. Divorce without a refund of dowry is possible in Afikpo clan of Afikpo Division and Awkunanaw community in Nkanu Division if ido nwani (ritual expulsion of a wife) is performed, see Customary Law Manual, op. cit., p. 294, p. 352(a).

communities, the amount refundable depends on who initiates the divorce, or who is responsible for the break-up of the marriage. Thus among the Efik, if a husband divorces his wife without cause he forfeits his marriage payments.[1] Ellis[2] notes that according to the customary laws of the Yorubas:

> If a husband should divorce his wife for adultery he can claim the restitution of the money he paid for her but not if he sends her away for any other cause.

This statement of Yoruba customary law, although supported by other writers on Yoruba customary law in traditional society[3] does not represent contemporary Yoruba customary law, under which dowry paid is refundable, irrespective of fault.

In some communities, account is taken of certain factors in the refund of dowry. Such factors include the duration of the marriage, the number of children the divorced wife produced by the husband, and the general contribution the wife made to the welfare and prosperity of the family as a whole during the subsistence of the marriage. There are some communities where the birth of a child absolves the wife's family from any obligation to repay dowry on the termination of a marriage whether by divorce or death of the husband.[4] On the other hand, in a few communities the divorced wife and her family have to refund double the amount paid by the husband as dowry, although this is usually the case only when it is the wife who initiates the

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1. Forde, Efik Traders of Old Calabar, op. cit., p. 14.
2. Ellis, The Yoruba-Speaking Peoples, op. cit., p. 186. See Bradbury and Lloyd, The Benin Kingdom, op. cit., p. 49 who records a similar custom for the Benins; Forde and Jones, The Ibo and Ibibio-Speaking Peoples of South-Eastern Nigeria, op. cit., p. 18; cf. Meek, Northern Tribes of Nigeria, op. cit., p. 215.
3. See Bowen, Central Africa, op. cit., p. 305, of the Yoruba wife: "If divorced for adultery, she or her family are obliged to refund the dowry to the husband".
4. See generally, Meek, Law and Authority, op. cit., pp. 280-284; Customary Law Manual, op. cit., pp. 294-299; Thomas, Anthropological Report of the Edo-Speaking Peoples, op. cit., p. 57; Meek, A Sudanese Kingdom, op. cit., p. 389.

divorce.[1] This practice is illustrated by the following agreement which was attached to the registration of a customary marriage at Onitsha Local Government office.

> 3rd July 1963
> An agreement to marry
> Agreement made between A and B of Mgbagbu, Owa town, in Ezeagu District, Enugu Province.
> Total amount (70) seventy pounds
> already given (20) twenty pounds
> to be paid (50) fifty pounds
> If I, A, refuse that B will no longer marry my daughter Esther, I agree to pay him back double all the amounts he B gave to me. But if I, B, refuse to marry the girl in my own fault, then I shall take from him A, the only amount I gave to him.

The agreement was signed by both parties and witnessed. It is evident that such laws, which impose a penalty on the bride and her parents if she should leave her husband, unnecessarily restricts her freedom to leave an unsatisfactory husband, for fear of incurring financial obligations on her parents. The laws are obviously discriminatory and infringe section 39 of the Nigerian Constitution 1979.

(iii) Responsibility for refund of dowry

In most societies it is primarily the duty of the wife's father or other legal guardian to refund the dowry due in the case of a divorce.[2] As seen above, the dowry is usually payable to the girl's father, and in many

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1. See Meek, Law and Authority, op. cit., p. 281, who notes that in Owerri Division, it had been customary, "for the members of the wife's family to swear that, if she left her husband without reason, twice the amount of the bride-price would be repaid"; see also Aniogulu, op. cit., p.111.

2. See Customary Law Manual, op. cit., p. 300, p. 361(1); Nwogugu, Family Law in Nigeria, op. cit., p. 183.

societies he has no legal duty to share it with anyone, including the bride and her mother. In other societies, although the father may be entitled to the largest share, he has a duty to give some defined portion of it to the bride's mother and to other members of the family.[1] When the dowry has to be refunded, however, it is the legal duty of the father to make the refund, whether or not individual members of the family may have shared the dowry originally. Other members of the family may contribute to the refund of dowry but the legal responsibility is that of the wife's father, or other legal guardian who takes the place of her father.

Among some communities, for example Eket and Oron Ibibios, when the father of a family dies, the girls of the family are distributed among the boys of the family. The male to whom a girl is allotted is legally entitled to receive dowry on her behalf. Correspondingly, he has a duty to refund any dowry paid on behalf of her marriage when there is a divorce. If he himself is in parentis loco, his legal guardian undertakes the responsibility on his behalf.[2]

In some communities, notably among the Igbos, dowry is not repayable until the wife has found a suitor who pays dowry to her father.[3] It is then the father's

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1. See further above, Chapter VI, pp. 491-493.

2. Information obtained from informants in Eket, but see Bradbury and Lloyd, The Benin Kingdom, op. cit., p. 156; the division of the marriage-payment ensures the assistance of both the father's and the mother's families should it later have to be returned.

3. See Bradbury and Lloyd, The Benin Kingdom, op. cit., p. 49; Forde and Jones, The Ibo and Ibibio-Speaking Peoples, op. cit., p. 18; Bohannan and Bohannan, The Tiv of Central Nigeria, op. cit., p. 76; Obi, Modern Family Law, op. cit., p. 364; Basden, Niger Ibos, op. cit., p. 240 Contrast the position among the Hausas, see Smith, Government in Zazzau, op. cit., p. 256: "A woman collects from her prospective husband the money she needs to repay portions of bridewealth to the husband she is leaving"; cf. the provision of the Marriage, Divorce and Custody of Children Bye-Laws, W.R.L.N.,456 of 1958: "If any parent of a bride receives a dowry from another man before the dowry repaid by the existing husband or bridegroom has been refunded, that parent shall be guilty of an offence".

duty to refund the dowry to the husband. It should be noted that until the dowry is refunded, the wife cannot remarry, and any purported marriage to the suitor who has paid dowry to the father is invalid.[1] The suitor in such circumstances has no legal duty to refund the dowry directly to the husband, although obviously it is in his interest to see that the husband has been repaid. Among the Yorubas, it is now customary for the suitor to repay the dowry directly to the husband, or the wife may herself repay the dowry and effect a divorce without the intervention of any member of her family, or a suitor.

Among the Igbos, a woman cannot refund the dowry directly to the husband. Even where she provides the money, refund must be made through her legal guardian, who is generally her father, or someone acting on his behalf.

(iv) The time at which a refund is due

The time within which a refund of dowry must be made also varies from community to community. In Eket, for example, dowry is repayable as soon as the parties and their families agree that the marriage has broken down irretrievably. Informants in Eket say that it is considered a serious social disgrace for the family who is unable to repay the dowry once there is a permanent separation. As a result, the family makes frantic efforts to raise the money and thereby save their reputation. This is borne out by the fact that the Eket Customary Court usually orders an immediate refund of dowry when a divorce has been granted. The Ibibios in Calabar also have the same rules, evidenced by the orders for the immediate repayment of dowry by the Calabar Customary Court.

In Onitsha, on the other hand, the dowry is not repayable until the wife finds another suitor who is prepared to refund the husband's dowry.[2] This rule obtains

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1. See Edet v. Essien [1932]11 N.L.R.47.

2. See Obi, Modern Family Law, op. cit., p. 364; but see Meek, Law and Authority, op. cit., p. 282.

amongst the Yoruba also. The prospective husband pays dowry in order to marry the woman, and from this payment refund is made to the woman's husband.[1]

In some communities, the time at which dowry becomes repayable depends on whether the wife was responsible or not for the break-up of the marriage. Where the wife is responsible for the break-up, or in some cases where she initiates the divorce, the dowry becomes repayable immediately. If the husband is the guilty party, however, he has to wait until another man wishes to marry the wife and pays dowry in order to do so.[2]

C. The modern society

The laws relating to refund of dowry discussed above remain valid with reference to extra-judicial divorce, in contemporary Nigeria. Generally, refund of dowry continues to be essential to a valid divorce from a customary law marriage in most Nigerian societies. In some communities, for example, Onitsha, the attachment to payment and refund of dowry as the legal criteria of a valid customary law marriage and divorce respectively, is so strong that a statutory marriage, unaccompanied by payment of dowry is not recognized as a valid marriage. Similarly, a pronouncement of divorce by a court of any kind is not recognized by the community, unless and until the dowry has been refunded. Thus The Customary Law Manual states:

> For divorce to take place, the bride-price and other marriage payments must be repaid to the husband or his family. It is immaterial that the husband is the party at fault or that the marriage is dissolved at the instance of the wife or

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1. See Forde, The Yoruba-Speaking Peoples, op. cit., p. 28; Chawere v. Aihenu and Johnson [1935]12 N.L.R.4.

2. Meek, Law and Authority, op. cit., pp. 281-282; Nwogugu, Family Law in Nigeria, op. cit., p. 184; see s.11, Declaration of Biu Native Marriage Law and Custom Order, 1964, N.R.L.N.9 of 1964; Obi, Modern Family Law, op. cit., p. 364.

> her maiden family. Husband and wife cannot rightly be said to be divorced unless and until the bride-price paid on the wife has been refunded to the husband or, if he is dead, to his family; or is paid into court and divorce is pronounced by the court.[1]

Attempts have been made by some local authority bye-laws to restrict the right of a husband to a refund of dowry on divorce under certain circumstances. For example, the Ibadan District Council Marriage Divorce and Custody of Children Bye-Laws, 1965, provides that "no dowry shall be refundable in the case of a woman divorced on the ground of having contracted leprosy subsequent to her marriage."[2]

With reference to judicial divorce, generally, refund of dowry is held to be the sine qua non of a valid divorce, in most systems of customary law except where the law has been specifically changed by local enactments.[3]

Considerable confusion relating to the refund of dowry in customary law divorces has been introduced by the conflicting decisions of the courts, especially those in the former East Central State, where no written rules of customary law have been generally adopted. There has been an attempt to dispense with the payment of dowry as an essential of a valid customary law divorce by some judicial decisions. The abolition of payment and refund of dowry as essentials to a valid customary law marriage and divorce would be a boon to the legal status of women, but unfortunately, most of these particular decisions were not in favour of the woman.

For example, in Okpanum v. Okpanum,[4] the respondent

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1. Customary Law Manual, op. cit., p. 294, par. 352; see also Delano, The Soul of Nigeria, op. cit., p. 141; cf. Shelton, The Igbo-Igala Borderland, op. cit., pp. 136-137.

2. Marriage, Divorce and Custody of Children, Adoptive Bye-Laws, 1965, Proviso to S.6.

3. Nwogugu, Family Law in Nigeria, op. cit., p. 183; Customary Law Manual, op. cit., p. 294, par. 352.

4. [1972]2 E.C.S.L.R.561.

filed a notice of marriage between himself and the co-respondent. The caveatrix entered a caveat against the issue by the Registrar of marriages of a certificate pursuant to the notice of marriage on the ground that she was lawfully married to the respondent in June 1969, by native law and custom, and that this marriage was still subsisting up to the time of the present action. The respondent denied the existence of the marriage, asserting that only preliminary steps had been taken when he decided not to continue with the marriage. He testified that no rituals or ceremonies which are necessary to the validity of a marriage under customary law, had been performed. He admitted paying £120 out of an agreed total of £170 dowry. The respondent further stated that he had called a meeting of the representatives of both his own and the caveatrix families, at which he announced that he no longer wished to proceed with the marriage.

The court had to determine two questions:-

(i) whether there was a marriage contracted between the caveatrix and the respondent according to customary law;

(ii) if there was a valid marriage, whether it had been validly terminated by the respondent.

The Court found that all the necessary elements of a valid customary marriage were present and that there was, consequently, a valid marriage contracted in June 1969.

With reference as to whether the marriage had been validly terminated by the respondent, the counsel for the caveatrix argued that a marriage is not terminated until the dowry is refunded. Agbakoba, J., rejected this argument. He said:

> Where dowry is not refunded the marriage is nevertheless terminated although certain incidents of the marriage are not terminated until the dowry is refunded. I am unable therefore to sustain learned counsel's submission and the learned expositions of eminent writers like Basden on the Niger Ibos. Wieschooff on Divorce Laws and Practices in Modern Ibo Culture, and even the recent work of Obi on Modern Family Law in Southern Nigeria, to mention a few of such writers, do not support his argument. In my view the facts I have found in this case amount to a

> dissolution of marriage under native law and custom and I must therefore hold that the marriage between the respondent and the caveatrix had been terminated by the respondent and was not subsisting when the respondent and the co-respondent filed their notice of marriage.
>
> I must advert a while to the last paragraph of the caveatrix's affidavit which averred that she is pregnant with a child the paternity of which is attributable to the respondent. I can only say that the averment lacked fullness and disclosed no grounds to show that the respondent had access to the caveatrix. Earlier in her affidavit the caveatrix said the respondent sent her home in 1970 to stay with his mother at Nibo whilst he lived at Enugu. The age of the pregnancy was not stated but in any case I am bound to take judicial notice that human gestation enures for nine months and I cannot therefore say that the pregnancy of the caveatrix in 1972 was as a result of association with the respondent in 1970 when he last had access to her.[1]

The Judge ordered that the caveat should be removed and a Registrar's certificate of marriage issued to the respondent and co-respondent to enable them to marry under the Marriage Act.

There are several points of interest in this decision.

(a) It is respectfully submitted that the learned Judge's averment that a refund of dowry is not essential to dissolve a marriage under Igbo customary divorce law cannot be supported. There is abundant judicial and academic evidence to the contrary both in traditional and contemporary society.[2] The strongest evidence militating against the

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1. Ibid., p. 565.

2. See Obi, Modern Family Law, op. cit., p. 372; Nwogugu, Family Law in Nigeria, op. cit., p. 183; Kasunmu and Salacuse, op. cit., p. 172; Achike, "Problems of Creation and Dissolution of Customary Marriages", op. cit., p. 153; Ikedingwu v. Okafor [1966-1967]10 E.N.L.R. 178.

decision is the current practice of the Igbos. In all Igbo societies refund of dowry is necessary to dissolve a customary marriage (although a reduction may be mutually agreed to in certain circumstances), unless the refund of dowry has been specifically waived by the husband, or his family acting on his behalf and with his consent. At least one of the authorities cited by the learned Judge does not support his contention. A search of Obi's book failed to reveal any support for his statement. In fact Obi asserts that refund of dowry is essential to a valid divorce with reference to the whole of Southern Nigeria.[1]

(b) It is interesting to know what incidents of the marriage are not terminated until the dowry is refunded, since in the instant case the caveatrix averred that she was pregnant with a child whose paternity she attributed to the respondent. The learned Judge, however, held that the averment of pregnancy disclosed no grounds to show that the respondent had access to the caveatrix.

It is not clear which law was applied by the learned Judge in this respect. According to Igbo customary law, provided the dowry is not repaid, all children begotten by the wife, regardless of the actual genitor, are legally affiliated to the husband.[2] The principle of English common law justifying judicial notice being taken that human gestation enures for nine months[3] does not apply to such

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1. Obi, Modern Family Law, op. cit., p. 372.
2. See further, Chapter VII, pp. 593-607.
3. In Preston-Jones v. Preston Jones [1951]1 All E.R.124, H.L., the House of Lords were agreed that the Court could take judicial notice of the fact that there is a normal period of gestation (variously given as 270-280 days or nine months) but Lord Macdermott added that judicial notice must also be taken of the fact that the normal period is not always followed, and the actual period may be longer or shorter. It may be 360 days. See Rone-Oruboh v. Rone-Oruboh [1973] 7 CCHCJ., 80 where the Court declared that it was unable to say whether a child borne eleven months after the last act of sexual intercourse between the parties, was a child of the husband.

cases in customary law. Once a valid marriage has been contracted, and dowry has not been refunded, or its refund waived, the husband should have been adjudged the legal father of the child conceived by the wife. The period of human gestation is irrelevant in such cases. It is not easy to see what incidents of the marriage remained until dowry had been refunded if legal paternity was thus denied.

(c) It is respectfully submitted that affiliation of the child yet unborn, was not a matter before the court. The matter was referred to the Court under section 15 of the Marriage Act, and the parties were required to show cause why the Registrar's certificate of marriage should not be issued. Whether the caveatrix was pregnant by the respondent, or not, was irrelevant to the issue before the court, as was the question as to whether or not the respondent had access to the caveatrix at a particular date. Pregnancy of a woman neither creates a marriage, nor is it a bar to a divorce in Igbo customary law.

(d) It is pertinent to consider whether, without refund of the dowry, the wife was free to contract another marriage, either under customary law or under the Marriage Act. Since the husband was free to contract a marriage under the Marriage Act, it meant that he was no longer married to the caveatrix. Consequently, she was not married to him, and therefore had capacity to marry another man according to customary law or under the Marriage Act. Would the children begotten for a husband married to the caveatrix under the Marriage Act in such circumstances be legally affiliated to the first husband?

On the other hand, to deny that the wife could remarry under the Marriage Act would only be justified if she was considered as still married to the first husband. In such a case, the husband should not be permitted to marry another woman under the Marriage Act, since polygyny is forbidden thereunder.

It is respectfully submitted that this decision introduces a great deal of confusion into the law. Under customary law as practised in most areas of the country today, refund of dowry, or some agreed portion, is recognized

as necessary for the dissolution of a marriage, unless the refund has been specifically waived by the husband. In Ikedingwu v. Okafor,[1] it was held that since the respondent, had renounced the bride, and the £100 paid as dowry, the caveat against his proposed marriage to another woman under the Marriage Act could not be sustained, as both parties were free to remarry.

A husband whose dowry has not been refunded, and who has not waived his right to a refund, should not be permitted to marry under the Marriage Act, unless the divorced wife is permitted to remarry under customary law or the Marriage Act.

There are conflicting decisions as to the legality of a divorce without refund of dowry. For example, in Iloka and Anor. v. Ibe,[2] Nwokedi, J., held that a customary marriage could only be dissolved by the refund of dowry by the wife or by the death of one of the spouses and remarriage by the surviving spouse. The learned Judge held that "Outside these two conditions in Igbo customary law the marriage, even where the parties are living apart, still persists". He refused to follow what he described as "the academic approach of Agbakoba, J. in Okpanum v. Okpanum".[3] Although it is difficult to see why remarriage is necessary to dissolve a marriage, (at least in the case of the surviving husband), after the death of one of the spouses, it is respectfully submitted that this decision is more consonant with the actual practice of the people as observed by the present writer in all the communities visited during field-work, than Agbakoba, J.'s decision in Okpanum v. Okpanum.[3]

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1. [1966-1967]10 E.N.L.R.178.
2. [1973] Suit No. HO/32/73, unreported, Okigwe High Court.
3. [1972] E.C.S.L.R. 561.

D. When is a customary law marriage dissolved by a divorce?

It is necessary to determine the point in time at which a customary marriage is dissolved by divorce and what legally terminates the marriage. It has been seen that, when the dissolution of a customary marriage is effected extra-judicially, the marriage is not dissolved until the dowry has been paid and accepted.[1] This is so even where the marriage has broken down irretrievably, and the parties have separated for many years with no intention of resuming the marital relationship. In other words, mere separation does not constitute divorce in a customary marriage. In such cases it may be said that it is the refund of dowry which legally terminates the marriage.[2]

Where the divorce is granted by a Court, however, the divorce takes effect from the issue of the court order dissolving the marriage, even though the dowry has not been refunded. Here, it is the order of the court which terminates the marriage.

In Egri v. Uperi,[3] the plaintiff had been granted £20 as the refund of dowry allegedly paid by him, although he had sued, not for dissolution of the marriage, but the return of his wife detained by her father who denied the marriage. On appeal, the Supreme Court observed that

> ... in proceedings before a customary court, an order for the repayment of bride price or dowry... is usually made subsequent to an order for the dissolution of a customary marriage.

This statement could be contrasted with the decision in Nwanko and Anor v. Uba.[4] The wife, one of the plaintiffs

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1. See Nwogugu, Family Law in Nigeria, op. cit., pp. 182-183; Kasunmu and Salacuse, op. cit., p. 178.

2. See further above, pp. 652-654.

3. Egri v. Uperi [1974] 4 E.C.S.L.R. 632 at pp. 627-628.

4. [1974] Appeal No. HO/1A/74, unreported decision of Okigwe High Court.

claimed that because of her husband's cruelty to her, she wished to return the dowry of N60 paid by him. The proceedings were recorded by the Magistrate as follows:

> Charge read and explained to defendant. Defendant pleads not liable as there is no divorce to the said marriage. Case is adjourned to 30/8/73 for plaintiff's counsel to satisfy the court that the defendant's plea is not [a] complete answer to his claim.

The next day, the case was dismissed with costs against the plaintiffs on the submission of a preliminary objection that the writ disclosed no cause of action, and ought to be struck out under Order 2, Rule 2 of the Magistrates Court Rules. The Magistrate said:

> By our custom which this court takes judicial notice of, the right for the refund of dowry does not arise until there is divorce. The writ does not say there was such a divorce and therefore there is no liability on the defendant to accept the refund of dowry by the plaintiffs.

The Okigwe High Court granted an appeal on the ground that the procedure adopted by the learned Magistrate was unorthodox. It is, however, the statement of law by the learned Magistrate that is particularly relevant here. His statement seemed to suggest that under customary law, a divorce is effected without a refund of dowry, or an order of a court.

It is respectfully submitted that this is not a correct view of Igbo customary law. The plaintiffs could not have stated in their claim that there had been a divorce, since the dowry had not been refunded, nor had a court order dissolving the marriage been obtained.

The Magistrate had jurisdiction to dissolve the customary marriage under the Magistrates' Courts Law (Amendment) Edict, 1971,[1] of the former East Central State. The correct procedure would have been for the plaintiffs to sue for a divorce, and an order compelling the defendant to accept the refund of the dowry.

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1. Section 5.

Because of the hardship experienced by women as the result of the abolition of Customary Courts, many wives seeking to divorce their husbands have attempted to find a way out by depositing the money in the Magistrates Courts when their husbands refuse to accept a refund of dowry. Generally, Magistrates have rejected this procedure, and have insisted that such deposits are only acceptable after a court order dissolving the marriage had been obtained.[1]

6. The Incidence of Divorce in Customary Law Marriage

A. The traditional society.

Observers of African customary law marriage have stressed the ease with which the marital tie may be legally dissolved. This has led to the unfortunate view that African customary marriage is inferior to European marriage. It has been seen that, in some quarters, even the name "marriage" is denied to customary unions.[2]

There is evidence of the fact that marriages in other traditional societies were no less easily dissoluble in legal theory, and examples of societies which traditionally permitted divorce with relative ease are not difficult to find, especially with reference to the husband's ability to divorce his wife. A few examples will suffice to support the contention.

Foremost among communities in which divorce was relatively easy was the early Hebrew society. It is said that the "right of the husband to divorce his wife at his pleasure is the central thought in the entire system of Jewish divorce law".[3] The Mosaic law states that "if a

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1. This is the practice at Enugu, Nsukka and Onitsha Magistrates' Courts.

2. See further, above, Chapter III, pp. 201-205.

3. See Westermarck, The History of Human Marriage, Vol. III, p. 307.

wife finds no favour in her husband's eyes, because of some uncleanness in her; then let him write her a bill of divorcement and give it in her hand, and send her out of his house".[1]

That the right of divorcing his wife belonged to the Roman husband in very early times cannot be doubted, since it is expressly recognized in the laws of the Twelve Tables.[2]

In the historic period of Greece, divorce was far from unusual. Only one restraint was imposed on the Greek husband who wished arbitrarily to repudiate his wife: he must return her dowry. If she was adulterous, he was legally bound to repudiate her, but must still restore her dowry. There seems to have been little ceremony involved in dismissing a wife.[3]

The pagan Arabs permitted a husband to repudiate his wife whenever he pleased; and this ancient privilege was too thoroughly fixed in Arabic custom, and too congenial to the nature of the Prophet and his followers to be changed.[4]

In the law-books of Celtic peoples are found various rules relating to divorce from which the conclusions may be drawn that divorce was by no means an uncommon occurrence. "In ancient Wales either husband or wife may practically separate whenever one or both choose".[5] In

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1. Deuteronomy XXIV, Verses 1-4; see also Isidore Epstein Judaism: A Historical Presentation (Penguin Books, 1975 reprint), p. 167.

2. See Goodsell, A History of Marriage and the Family, op. cit., p. 125; see also Bryce, Studies in History and Jurisprudence, Vol.II, op. cit., p. 802; Corbett, The Roman Law of Marriage, pp. 218-248; Westermarck, History of Human Marriage, op. cit., Vol.III, pp. 320-323; Pollock and Maitland, op. cit., Bk.II, p. 392.

3. See O'Faolain and Martines, Not in God's Image, op. cit., p. 23; Westermarck, History of Human Marriage, Vol.III, op. cit., pp. 318-319.

4. Westermarck, History of Human Marriage, Vol.III, pp. 311; see also Ameer Ali, Mohammedan Law, Vol.II, op. cit., p. 511.

5. Westermarck, History of Human Marriage, op. cit., p. 324.

ancient Ireland separation might take place either by mutual consent or as the outcome of legal proceedings.[1]

Among the Teutons, marriages could be dissolved by agreement between the husband and the family of the wife, and the husband was permitted to repudiate his wife if she was sterile, or guilty of conjugal infidelity, and perhaps for some other offences.[2] It was Christianity which revolutionised European legislation with regard to divorce, yet by 1953 an English lawyer could write that a valid marriage is the only condition precedent to divorce which cannot be circumvented somehow.

Divorce, it is almost universally agreed, is now a civilized institution, "a rightly sanctioned escape mechanism from an intolerable and potentially damaging situation". In most countries today marriages are easily dissolved in law, as well as in fact. Epstein, writing of divorce in America notes:

> In some circles, not to have gone through a divorce seems more exceptional than having gone through one; here living out one's days within the confines of a single marriage might even be thought to show an insufficiency of imagination, evidence that one is possibly a bit callow emotionally.[3]

A similar statement may be made of certain circles in other European societies,[4] but no one denies that these marital unions are marriages. The criteria of a marriage should not be the ease, nor the simplicity of the method of dissolution. Lowie has pointed out that it is important not to confound the actual frequency of divorce with its theoretical possibility.[5]

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1. Ibid., p. 323.

2. Goodsell, op. cit., pp. 210-211.

3. Epstein, Divorce, op. cit., p. 18.

4. See M.D.A. Freeman, "The Search for a Rational Divorce Law", Current Legal Problems, 1971, pp. 178-210.

5. Lowie, Primitive Society, op. cit., p. 65.

In traditional Nigeria, although marriage may have been in theory easy to dissolve, in practice, divorce was very difficult to achieve. Jordan reports:

> A man divorced his wife by simply ordering her out of the compound. There was no other technicality about it, though he generally added a wealth of symbolism by flinging her cooking pots after her. The fact that he had this extraordinary power served more than anything else to keep woman in subjection. In practice, it did not occur without very serious reason, because it caused endless complications.[1]

Nwogugu describes the mediatory role of the families of the spouses as "a bedrock for the stability of the marriage".[2] There is no difficulty, as will be later seen,[3] in finding couples among the older generation who have remained husband and wife for more than fifty to sixty years. The only ground for the dissolution of a marriage in the traditional society was the irretrievable breakdown of the marriage, and before a decision to this effect could be reached repeated efforts at reconciliation of the spouses would have been made by their families.[4]

There is sufficient evidence to support the statement that divorce in the traditional society was very rare, and "the husband and wife concerned usually parted with heavy hearts, having been convinced that their union had not been of benefit to the community."[5]

The position is quite different today, and in some parts of Nigeria, divorce may be described as extremely frequent.

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1. Jordan, Bishop Shanahan of Southern Nigeria, op. cit., p. 225; Meek, Law and Authority, op. cit., p. 280.

2. Nwogugu, Nigerian Family Law, op. cit., p. 178.

3. See below, p. 678.

4. See Nwogugu, Nigerian Family Law, op. cit., p. 178.

5. Delano, An African Looks at Marriage, op. cit., p. 31; see also Bradbury and Lloyd, The Benin Kingdom, op. cit., p. 190.

B. The modern society.

There are no reliable statistics of the incidence of divorce in contemporary Nigeria. The lack of adequate systematic recording of vital statistics of family life in Nigeria has been the subject of academic comments;[1] but inadequate recording of divorce statistics is not peculiar to Nigeria, and is a problem even in more advanced computerised communities. Epstein, pointing out the deficiencies in the reporting and recording of divorce statistics in America, notes:

> even if reporting were complete beyond the dreams of the most demanding statistician, statistics on divorce would nevertheless still elude the full reality ... They do not capture those couples whose marriages have dissolved both in spirit and in flesh but who continue to share a common roof, living in what sociologists call 'empty shell families'. And they most especially do not capture those couples who, for want of patience or money or both, do not seek the imprimatur of a court of law for their splitting up.[2]

Although written of divorce in America, this statement applies equally to Nigeria. The fact that non-judicial divorce is recognized in most communities makes the situation infinitely more difficult.

Traditionally, the practice in Nigeria was that when a marriage breaks down irretrievably, the spouses simply separate. Unless the wife wished to remarry (which was rare in some areas), a formal divorce was unnecessary. This pattern has been continued in modern society, and

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1. See e.g. R.C. Duru, "Problems of Data Collection for Population Studies in Nigeria with Particular Reference to the 1952/1953 Census and the Western Region", in Population of Tropical Africa, edited by Caldwell and Okonjo, op. cit., p. 72; A.B. Kasunmu, "Proof of a Polygamous Marriage in Nigerian High Courts", op. cit., p. 42.

2. Epstein, Divorce, op. cit., p. 20.

there are many married couples who are separated, but not legally divorced.

There is no lack of statements confirming the opinion that the rate of divorce in Nigeria has increased within the present century, and in some places is now so high as to be a cause for concern.[1] In most cases, however, these statements are not supported by concrete evidence, especially among legal writers.

A few anthropologists and sociologists have attempted to measure marital instability in numerical terms.

Marris, who conducted a social survey in Lagos, found that four-fifths of the marriages contracted by the householders interviewed had been successful, and the relationship between husband and wife was generally affectionate and co-operative. But he nevertheless asserts:

> ... divorce is still relatively frequent - a fifth of the householders had contracted one or more marriages which failed, a higher rate than any European country.[2]

In 1939, Forde found that among the Yako (a double-descent community in South-Eastern Nigeria), of the 152 younger married women between approximately 22 and 36 years of age interviewed, 38 (25 percent) had already been divorced once in their marital history. From the data collected, he concluded that the divorce rate had increased, and that at the time of his interviews, at least 30 percent of the women in Umor had been divorced at least once in their history.[3]

Similarly, Ottenberg found from records obtained among the Igbos of Afikpo, in 1952-1953 that about one marriage in three ended in separation or divorce. Case

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1. See Kasunmu and Salacuse, op. cit., pp. 180-181; Bascom, The Yoruba of Southwestern Nigeria, op. cit., p. 65; Parrinder, Religion in an African City, op. cit., p. 171.

2. D'Almeida v. D'Almeida [1973] 4 CCHCJ. 88; where the wife-petitioner, 39 years old, had three marriages and the longest any one had lasted was for two years.

3. See Forde, Marriage and the Family Among the Yako, op. cit., p. 75.

histories of marriages did not indicate that this instability was a new development.[1]

For the purposes of this research, 268 married women were interviewed in Oyo and Anambra States. Of these women, 80 were Yorubas, and 188 Igbos. As shown in Table 8:1, of all the women interviewed, 214 (79.9 percent) were married once only; 43 (16 percent) were married twice; 10 (3.7 percent) three times, and 1 (.4 percent) four times. The total number of marriages contracted by all the women was 334, an average per woman of 1.2 marriages. Approximately one marriage in five ended in divorce. The rate of divorce among the Yorubas is higher than among the Igbos. The average number of marriages per Yoruba woman is 1.5, while among the Igbos, it is 1.1. Approximately one in every seven marriages end in divorce among the Igbos, while among the Yorubas it is approximately one in every three marriages.

TABLE 8:1

REPORTED INCIDENCE OF MARRIAGE AMONG SAMPLES OF YORUBA AND IGBO WOMEN FROM DATA COLLECTED DURING FIELD-WORK.

No. of times married	Yoruba women			Igbo women		
	No. married	Total no. marriages	Percent. of no. interviewed	No. married	Total no. marriages	Percent. of no. interviewed
1	49	49	61.25	165	165	87.7
2	22	44	27.5	21	42	11.2
3	8	24	10.0	2	6	1.1
4	1	4	1.25	Nil	Nil	Nil
	80 =	125	100.00	188 =	213	100.00

80 women were interviewed among the Yorubas and 188 women among the Igbos.

1. Ottenberg, The Afikpo Ibo of Eastern Nigeria, op. cit., p. 21.

Another angle from which the rate of marital discord may be viewed is to consider the number of divorces or other matrimonial disputes brought before the Customary Courts. In Ibadan, and among the Yorubas generally, divorce granted by a Customary Court is now the accepted norm. Statistics were obtained from two Customary Courts in Ibadan. The numbers of cases dealt with in these two courts are tabulated in Table 8:2 below. They provide some evidence (though inconclusive) of the rate of judicial divorce in Ibadan.

TABLE 8:2

NUMBER OF DIVORCE CASES DECIDED IN TWO CUSTOMARY COURTS, IBADAN.

Year	Grade "B" Court No. 4 Mapo	Grade "C" Court No. 1A, Agodi.
1969	-	447
1970	-	681
1971	-	513
1972	(6 months only) 404	448
1973	857	548
1974	827	339
1975	1030	316
1976	1116	410
Jan.-June 1977	641	213

The Table 8:2 above shows that, for the first full year [1973] for which statistics were available for both courts, a total of 1,405 divorces were recorded. There are twelve Customary Courts in Ibadan City Area. Two of these Courts are Grade "A", (mainly Appeal Courts), six Grade "B" and four Grade "C". On the assumption that a similar volume of work is done by each of the six Grade "B" Courts and four Grade "C" courts respectively, the number of cases heard by the Grade B courts would be 5,142, and in the Grade C Courts, 2,192; a total of 7,334 divorce

cases for the entire Ibadan City Area in 1973. By a similar assumption, the number of cases instituted in 1976, the last year for which complete statistics were available for both courts would be 8,336. This represents an increase of 1,002 (13.7 percent) cases in three years. This may be compared to the rate of increase in divorces in England. The number of divorce petitions filed for the whole of England are as follows: 1971 - 110,017; 1972 - 109,822; 1973 - 115,048; and 1974 - 129,993, The rate of increase over a period of three years is 19,976 divorces (18.2 percent).[1]

The rate of increase in the Ibadan figures, is not consistent. There was a drop in 1974, and the 1975 total is lower than that of 1973. There is no justification, therefore, for a general conclusion that the divorce rate is increasing. The figures for England show a similar inconsistency in the rate of increase.

Marital disputes recorded in Social Welfare Departments in different parts of the country afford no clear evidence to support the allegation that the rate of divorce is increasing in contemporary Nigeria. The statistics are similarly inconclusive, as Tables 8:3 and 8:4 below show. The tables show the number of marital disputes handled by the Social Welfare Departments in the former East Central State, (now Imo and Anambra States) and former South-Eastern (now Cross River) State. The figures were obtained from the Annual and other Progress, Reports examined by the present writer at the Headquarters of the Social Welfare Department in Enugu and Calabar.

None of the above evidence is conclusive as to the rate of divorce in any part of Nigeria; collectively, however, they indicate that the assertion that "divorce is rare" no longer pertains to Nigerian society.

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1. Extracted from the Civil Judicial Statistics Annual Report, 1974, Cmnd. 6361.

TABLE 8:3

MARITAL DISPUTES HANDLED BY SOCIAL WELFARE DEPARTMENTS, FORMER EAST CENTRAL STATE, NIGERIA.

Year	No. of Cases handled	Number settled
1970	951	584
1971	2,256	1,075
1972	4,159	2,458
1973	4,470	2,912
1974	4,053	3,012

TABLE 8:4

MARITAL DISPUTES HANDLED BY SOCIAL WELFARE DEPARTMENTS, FORMER SOUTH-EASTERN STATE, NIGERIA.

Year	No. of Cases handled
1972/1973	2,541
1973/1974	2,476
1974/1975	2,464
1975/1976	2,194
1976/1977	2,752

Note: Data refers to 1 April to 31 March, of each year.

The Legal Status of Women After Termination of Marriage by Death

7. The Legal Effect of Death on the Marital Relationship.

A. Introduction.

Are customary marriages terminated by death?

Many writers claim that the death of a wife terminates a customary marriage, but the death of a husband does not. Thus Obi asserts:

> The death of the wife terminates a marriage completely and for all purposes. It also abrogates all the usual customary rights and obligations which exist between the families of the two spouses by virtue of the marriage.
>
> The death of the husband, on the other hand, does not necessarily terminate the marriage, more accurately, perhaps, a husband's death does not terminate the customary law status of his wife as a married woman.[1]

The position where either spouse of a customary marriage dies will be examined in order to see how far such assertions are legally justified.

B. Death of the husband.

On the death of her husband the wife may either:

(a) voluntarily choose, or be compelled by law, to remain as the wife of her deceased husband; or

(b) be inherited by a member of her husband's family; or

(c) marry someone who is not a member of her husband's family.

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1. Obi, Modern Family Law, op. cit., p. 378; see also Nwogugu, Family Law in Nigeria, op. cit., p. 186; Kasunmu and Salacuse, op. cit., p. 181; Bascom, The Yoruba of Southwestern Nigeria, op. cit., p. 65; Uchendu, The Igbo of Southeast Nigeria, op. cit., p. 50.

In all the above cases the consensus of opinion seems to be that the widow remains the wife of her deceased husband. If, after the death of her husband she marries a man who is not a member of her husband's family, the previous marriage is terminated, it is claimed, not by the death of the husband, but by divorce. In the other two cases, the marriage to her deceased husband continues. This conclusion is based on the fact that a marriage is not terminated until dowry has been repaid.

In order to analyse the position the alternatives must be examined separately.

(i) Where the widow chooses, or is compelled to remain as the wife of her deceased husband.

There are a few societies in Nigeria where the remarriage of a widow is absolutely forbidden.[1] In the majority of societies, however, the widow has an option. She may remain a widow or not as she wishes. In either case, what is her legal status? Is she a "wife" or a "widow"? The assertion that she is a "wife" is based on the fact that the dowry is not usually repaid, and any children subsequently borne by the woman after her husband's death are legally affiliated to her dead husband. In this sense, her position differs from that of a woman married according to "English" law. In the latter case, children subsequently conceived, are not regarded as the children of the deceased husband. The assertion therefore seems justified.

But a marriage cannot be defined merely in terms of payment and refund of dowry, or affiliation of children. It has been seen that the status of marriage entails certain rights and obligations as between the parties to the marriage. Is the wife whose husband is dead, still subject to such obligations, or entitled to the rights, as are inherent in the marital relationship? It is submitted that the rights and duties of a wife are terminated on the death of her husband. For example, her duty of fidelity to her

1. See Talbot, Tribes of the Niger Delta, op. cit., p. 218, for such marriages among the Kalabari.

deceased husband is not operative. Although actions for adultery and seduction involving wives are numerous, there seems to be no cases in which such actions have involved a widow. The deceased husband's family has no right to bring such actions, since they involve personal rights and duties of the husband and wife only.

Similarly, the wife's duty to cohabit with her husband can no longer be enforced. If in defiance of the wishes of her deceased husband's family, she returns to live with her natal family, or with anyone else, no action for harbouring of a wife can be brought by her deceased husband's family. On the other hand, on the death of the husband, the husband's family is entitled to sue for a refund of the dowry paid on behalf of the widow[1] unless she marries a member of the deceased's family.

It has been seen previously that a customary marriage involves two separate contracts. One between husband and wife involving personal rights and obligations, and the other between the husband or his family and the wife's family. On the death of the husband, the contract between husband and wife terminates, but the contract between the husband and the wife's family does not. This latter contract is only brought to an end when the dowry has been refunded, or when the wife, the subject matter of the contract, dies. The principle of frustration of contract applies, and all rights and obligations cease.

The position in this case can be summed up: the status of marriage is terminated by the death of the husband and the woman can no longer be legally referred to

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1. See e.g. Laromeke v. Nekego and Ayo [1958] 3 W.A.L.R.306. See also Oguntuko v. Famuke [1910] Ilesha Native Council Record Book, Case No.6F, where a widow successfully brought an action for the recovery of dowry her deceased husband paid on a junior wife, and Felicia Abeni v. Theresa Anike [1962] Egba Odeda, Grade B, Customary Court, Case No. B.237/62, where a sister obtained refund of dowry from her deceased brother's wife, see Ekundare, op. cit., p. 39.

as a "wife"; the contractual relationship between the husband and the wife's family, however, is unaffected by the death of the husband until the dowry is refunded.

(ii) Where the widow is "inherited" by a member of the deceased husband's family

Two customs are involved in such situations, (a) the levirate custom, and (b) the so-called "widow-inheritance". Radcliffe-Brown has rightly shown that a distinction must be made between "widow-inheritance" and the true levirate marriage as practised by the Hebrews and many other societies, whereby on the death of a man, his widow is taken over by his brother, whose duty it is to raise children in the name of the deceased husband. Children born to the brother and the widow are affiliated to the deceased. In the different situation of widow-inheritance, the widow marries a member of the deceased husband's family, but the children she bears by the new husband are affiliated to him and not to her deceased husband.[1]

(a) The levirate custom. In those communities where the levirate custom is practised, the death of the husband does not legally terminate the marriage. The member of the deceased husband's family who takes over the widow simply takes the place of the deceased husband. Children borne by the widow subsequent to her husband's death are legally affiliated to the deceased and inherit from him. The rights and obligations of the deceased husband are also enforceable by or against the man who steps into his shoes by taking over his widow. By a legal fiction, the marriage is not dissolved by the death of the husband, and the argument is stronger in cases where the levirate custom is compulsory, since no consents are necessary.

Nigerian societies which observe the levirate custom are very few and are mainly found in the Northern

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1. See Radcliffe-Brown and Forde, African Systems of Kinship and Marriage, op. cit., p. 64.

States, especially among the peoples of the middle Niger region and the non-Islamic peoples of the central area of Northern Nigeria.[1] There is no evidence of compulsory levirate marriage at least in contemporary Nigeria. Ellis reports that a sort of limited compulsory levirate custom was formerly practised among the Yorubas where a man died without issue. He says:

> Formerly the levirate was in force, and when an elder brother died the brother next in order of age married the iyale, or head wife, and so in succession from brother to brother. There was no obligation to marry the subordinate wives of a deceased elder brother, and they usually devolved upon the legal heirs. If the deceased were childless, the son first born of the new union of the younger brother with the widow was named after the deceased, and was considered to fill the place of the son; he did not, however, as among the Jews, succeed to the property to the exclusion of the Levir - his inheritance lay solely in the house of his actual father.[2]

Although the Tiv practise the levirate custom, it is not compulsory.[3]

(b) The custom of "widow-inheritance". In communities where the custom of "widow-inheritance" obtains, the position is different, and it is submitted that the death of the husband terminates the marriage, because of the following reasons:-

(i) The consent of the widow is necessary for the new marriage, and in most societies her consent must be formally obtained. For example, in Nnewi (Igbo) area, each of the

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1. See e.g. The Tiv, Akiga, Akiga's Story, op. cit., pp. 316-317; Downes, The Tiv Tribe, op. cit., p. 18; see also E.J. Alagoa and A. Fombo, A Chronicle of Grand Bonny, (Ibadan: Ibadan University Press, 1972), p. 12; the statement in Kasunmu and Salacuse, op. cit., p. 182, to the effect that "Many Nigerian tribes practise levirate marriage" refers to "wife-inheritance"; see also Meek, Northern Tribes, op. cit., Vol. I, p. 193.
2. Ellis, The Yoruba-Speaking Peoples, op. cit., pp. 185-186.
3. See Akiga, Akiga's Story, op. cit., p. 317.

inheritors of the deceased hold out a knife, and the widow must grasp one to indicate her choice of a new husband. If she fails to accept any knife, or if none is held out for her to grasp, she is deprived of certain rights, for example, when she dies, no one will shave his hair for her, "because no one is her husband".[1]

(ii) The consent of the widow's natal family is also necessary, and in some communities has to be formally obtained. For example, in Onitsha, palm wine and kola-nuts are taken to the family, which if accepted by the family signifies their consent to the new marriage. They have the option to refuse the offer and withdraw their daughter. In such a case, dowry has to be refunded to the deceased's family if and when the widow remarries.[2]

(iii) The consent of the new husband is also necessary. In some communities, the person who is entitled to marry the widow is regulated by law. In other communities, he may be chosen by the members of the deceased husband's family from among themselves, but in all cases, he has the right to refuse.[3] There are many cases recorded in the Social Welfare Offices where a person entitled or chosen to marry a widow has actually refused to do so.[4]

(iv) A ceremony is usually performed when the widow marries the new husband. This ceremony does not differ

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1. See Emmanuel Alutu, Death and Funeral Rites Among Igbo People of Nnwe Division, B.A. dissertation, University of Nigeria, 1976, p. 28; see also Thomas, Anthropological Report of the Ibo-Speaking Peoples of Nigeria, Part I, op. cit., p. 66; Johnson, History of the Yorubas, op. cit., pp. 115-116; and 140; the widow exercises her choice by ballot; cf. Ellis, West African Sketches, op. cit., p. 42: the wishes of the widow are never consulted.

2. See Meek, Law and Authority, op. cit., p. 313, the deceased's heir has to present palm-wine, salt and 240 cowries to the widow's relatives, before escorting her back as his wife to his home.

3. See Esenwa, Marriage Customs in Asaba Division, op. cit., p. 74.

4. See below, Chapter XIII, pp. 440.

in essential details, whether she marries a member of her deceased husband's family or not. In both cases the elaborate procedure which usually accompanies a woman's first marriage is never repeated. It is performed once only in a woman's life-time. This custom has led to the statement that "No woman is married a second time".[1] In actual fact it simply means that the ceremonials of a marriage is performed once only for a woman.

(v) Any children the widow conceives after the death of her husband are legally affiliated to the new husband and not to the deceased. Such children inherit rights and duties in the family with reference to the new husband and not to the deceased.[2] This provides convincing evidence that it is a new marriage. The dowry paid by the deceased is transferred to provide the dowry for the new marriage, and the picture becomes clear if this situation is compared with the one where the widow marries outside her deceased husband's family. Here, the new husband refunds the dowry to the deceased's family, and they, in turn, can utilize it in marrying another woman. If this is done, the woman thus married, is never considered as being married to the deceased.

(vi) When the first husband dies, the widow has to mourn for him, and perform other rituals signifying the severance of their marital relationship. If she marries a member of the deceased husband's family who subsequently also dies, she has to perform another mourning ceremony for the second husband. In other words, the identities of the husbands remain separate and are not merged.

In many societies, after the second burial of the husband, a woman performs certain rituals which symbolises

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1. See Delano, The Soul of Nigeria, op. cit., p. 142; Fadipe, op. cit., p. 89; Johnson, op. cit., p. 116; Bascom, The Yoruba of Southwestern Nigeria, op. cit., p. 65; Ward, The Yoruba Husband-wife Code, op. cit., p. 110.

2. See Uchendu, The Igbo of Southeast Nigeria, op. cit., p. 50.

the severance of the marital tie between her and the deceased husband, in much the same way as in the case of a divorce.[1] Unless these rituals are performed she is prohibited from remarrying to anyone, including a member of the deceased's family.[2]

For these and other reasons[3] it is submitted, that legally, a customary marriage is terminated by the death of the husband, except in societies where the levirate custom is practised, and as previously mentioned such societies are rare in Nigeria.

C. Death of the wife

In some communities, on the death of a wife, her family has a legal obligation to provide the husband with another wife, usually the deceased wife's sister, or to refund the dowry paid on behalf of the deceased wife. This obligation is most often imposed in cases where the deceased wife had borne no children by the husband before her death. Any children borne by the substituted sister are legally affiliated to the deceased wife and are reckoned as having been begotten by her in some societies. In such cases the substituted sister merely "steps into the shoes" of the deceased. The practice referred to as the "sororate" custom[4] is similar to the levirate custom, and it may be argued that the marriage is not terminated by the wife's death for the same reasons as were advanced in the case of the levirate custom.

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1. See Basden, Niger Ibos, op. cit., p. 279; among some Igbos, a woman breaks her owulu necklace and substitutes another of beads or other finery, which indicates that she is again marriageable; see also Meek, Law and Authority, op. cit., pp. 310-313.

2. Basden, Niger Ibos, op. cit., p. 291.

3. See Meek, Law and Authority, op. cit., p. 313, who describes a ceremony performed by a widow by which she apparently divorces herself from her dead husband.

4. See J.S. Boston, The Igala Kingdom, (Ibadan: Oxford University Press, 1968), p. 63.

Where the substituted wife bears children in her own right, however, it is a new marriage, since she does not take the place of the deceased wife. The situation here is similar to "widow-inheritance", and may be termed "widower-inheritance". The fact that no dowry is payable for the second wife does not alter the situation, since the deceased wife's family has an obligation to refund the dowry if they do not offer another wife to the widower.

In some societies, the "sororote" custom, or "widower-inheritance" does not apply, but where the deceased wife's family and the widower had a good relationship, another member of the deceased wife's family is given to the husband, without further, or with a reduced payment of dowry.[1] In such cases, it is a new marriage; the family waives their right to payment of dowry for the second daughter.

The general conclusion is, therefore, that the death of either husband or wife terminates the marital relationship which exists between husband and wife, with the possible exceptions of those communities which practice the levirate and sororate customs. The contractual relationship which exists between the husband and his wife's family continues after the husband's death, and is only terminated by the death of the wife, or the refund of the dowry after the husband's death.

8. Mourning Ceremonies

Among nearly all communities in Nigeria, the severance of the marriage ties by the death of either spouse is accompanied by ceremonies.[2] These ceremonies may be preceded by a period of mourning which, in the case

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1. See Meek, Law and Authority, op. cit., p. 284.

2. See Talbot, The Peoples of Southern Nigeria, op. cit., pp. 468-537; Johnson, History of the Yorubas, op. cit., pp. 138-139.

of the widow may be extensive and degrading. In many cases, the wife was traditionally buried with her husband.

One of the greatest changes in the legal status of married women relates to the observance of mourning ceremonies in the different parts of the country. Some of the various practices imposed on women in the traditional society are examined in order to appreciate the changes in the law; changes mainly due to the influence of Christian missionaries.[1]

A. The traditional society

Among most communities in Nigeria a wife was traditionally buried with her deceased husband.[2] Talbot notes that among many of the Ibibios, by old custom, the best loved wife and many of her fellows were killed and buried with their dead "lord".[3] The killing of wives of a deceased husband was especially important in cases where the dead husband was a king, a chief, or other wealthy person.[4]

Mockler-Ferryman, in 1892, recorded the case of the chief of an Igbo town who had died, and, according to custom, his wives, five in number, as well as a considerable proportion of slaves, were placed alive in the grave of the chief, their wrists and ankles having been

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1. See Waddell, op. cit., pp. 550-556; Macfarlan, Calabar: The Church of Scotland Mission, op. cit., pp. 62-63.
2. See Roth, Great Benin, op. cit., p. 97, and old authorities cited therein; see also Meek, Northern Tribes of Nigeria, op. cit., Vol.II, pp. 125-126; Jervis, Of Emirs and Pagans, op. cit., p. 111; Macfarlan, Calabar: The Church of Scotland Mission, op. cit., pp. 32-33; no human sacrifice was offered among some communities, e.g. Jekri, see Talbot, The Peoples of Southern Nigeria, op. cit., p. 481.
3. Talbot, Peoples of Southern Nigeria, op. cit., p. 517.
4. See Kingsley, Travels in West Africa, op. cit., p. 484; Talbot, Peoples of Southern Nigeria, op. cit., Vol.III, p. 479 et. al.: "Four women were buried alive at the head of the Alafin, another four at the feet and four boys on each side, as well as the lamp-bearer. In addition, many wives and nearly all the principal members of the royal family and his immediate entourage were forced to commit suicide".

previously broken in order to prevent them from escaping. Around the grave, which was a huge open pit, guards with massive clubs were also stationed, ready to strike down anyone attempting to crawl out.[1] Similarly, Meek describes the funerary honours which were paid to Ajetto, the Olu of Aworo when he died in 1895. He noted:

> to mark the importance of the event about twenty slaves were immolated. Some of his wives were also slaughtered, and others were buried alive with their husband; several little boys and girls were entombed (to fetch water and light the old man's pipe), and the cries of these little ones were heard three and four days after.[2]

Lander describes how two wives of a lately deceased chief hid themselves in order to avoid being clubbed to death. One was discovered and forced to drink poison.[3] The practice of killing the wives of a deceased king or chief was confirmed by many older people during field-work. The opinion was expressed that the practice still obtains, although done secretly, in some parts of the country, notably Benin.

The reason advanced for the custom of burying wives with their deceased husband is that the deceased needs people to serve him in the next world and no one could be better for this purpose than those who had served him in this world.[4] A more prosaic and common-sense reason, however, is that if the wife knows she is to be buried with the husband, she would do nothing to hasten his death, for example, by poisoning[5].

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1. See Mockler-Ferryman, Up the Niger, op. cit., p. 6.
2. Meek, The Northern Tribes of Nigeria, op. cit., Vol.2, p. 126.
3. See Richard Lander and John Lander, Journal of An Expedition to Explore the Course and Termination of the Niger, op. cit., pp. 64-66.
4. See Kingsley, Travels in West Africa, op. cit., p. 491-492; Talbot, Peoples of Southern Nigeria, Vol.III, op. cit., p. 472; Meek, Northern Tribes of Nigeria, Vol.2, op. cit., p. 126.
5. Talbot, Peoples of Southern Nigeria, op. cit., p. 472. Kingsley, Travels in West Africa, op. cit., pp. 488-489.

It is said that women happily embraced death in this manner, and a woman considers it an honour to be chosen as the wife worthy to be buried with her deceased husband.[1] This proposition is doubtful. Preservation of life is an innate tendency even among the lower animals. It is more probable that dispassionate resignation may have been mistaken for real happiness.

(i) Ordeals and tortures

Wives not sufficiently worthy to be buried with their deceased husbands, and wives whose husbands were not kings or chiefs or other important men, were subjected to gruelling ordeals. The object of such ordeals, was to discover the degree of their responsibility for their husbands' deaths.[2]

This tendency to regard wives with suspicion, in relation to their husbands' death, still lingers in present day Nigeria,[3] although suspected wives may no longer be subjected to ordeals or tortures to prove their innocence.[4]

Trials by ordeals in the case of widows, to prove their innocence of causing their husband's death, were similar to those conducted to prove innocence in

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1. See Roth, Great Benin, op. cit., p. 43; for evidence to the contrary see Waddell, op. cit., p. 337.

2. Kingsley, Travels in West Africa, op. cit., p. 333; Egharevba, op. cit., p. 74; Leonard, The Lower Niger and Its Tribes, op. cit., p. 480; Meek, Northern Tribes of Nigeria, op. cit., Vol.1, p. 266. cf. the early English law "trial by ordeal".

3. Such accusations figure prominently in divorce cases, see e.g. Sotomi v. Sotomi [1976] 7 C.C.H.C.J. 1901; Folawiyo v. Folawiyo [1970] 2 All N.L.R. 208; D'Almeida v. D'Almeida [1973] 4 C.C.H.C.J.88.

4. See Ordeal, Witchcraft and Juju Ordinance, 1903, S.2; see below, p. 692, n.1.

cases of alleged adultery.[1]

(ii) Mourning

Wives fortunate enough to escape trial by ordeal, or who were proved innocent after such trials, had to mourn for their husbands, regardless of their personal feelings or relationships with their deceased husbands. The practices which widows had to observe were rigorous, and the penalties imposed for breaches in some societies, were severe. During the early part of the mourning period, widows were not permitted to bathe even during periods of menstruation. They could not change their clothes, nor comb their hair. An old chief in Nsukka described the appearance of a widow in traditional society as "a mad woman with matted hair, filthy appearance and smelling like carrions".[2]

Such harsh practices were observed mostly among the Igbos,[3] and Ibibios,[4] but the overwhelming majority of communities, including the Moslem communities in the Northern States, imposed strict mourning ceremonies on widows.[5]

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1. See above, Chapter VII,pp. 562, 568; except in the case of very old people, death is never regarded as stemming from natural causes. It is always attributed to either poisoning or a form of divine retribution.
2. Recorded interview with Chief Ozo, of Ovoko Town, Nsukka, held at Nsukka, 29 August 1977; cf. the position of widows under customary law in Sierra Leone, where water used for washing the corpse of the deceased husband is mixed with clay and smeared over the body of the widow to indicate that she is mourning, see Olive P. Taylor, "The Position of Women under Sierra Leone Customary Family Law" in African Indigenous Laws, op. cit., p. 223.
3. See Leith-Ross, African Women, op. cit., pp. 212-214; Basden, Niger Ibos, op. cit., p. 279; Forde and Jones, op. cit., p. 27.
4. See Kingsley, Travels in West Africa, op. cit., p. 487. Talbot, Woman's Mysteries, op. cit., pp. 223-229.
5. See e.g. Hodge, Gazetteer of Ilorin Province, op. cit., p. 48; Jervis, Of Emirs and Pagans, op. cit., p. 111; Ajisafe, op. cit., p. 84; Talbot, Tribes of the Niger Delta, op. cit., pp. 222-230; Johnson, History of the Yorubas, op. cit., p. 138; Macfarlan, op. cit., p. 62.

The question may be asked whether these practices were legal or merely social in nature. Undoubtedly they were socio-religious. The main reason why the widow was forced to neglect her personal appearance and cleanliness was to render her as unattractive as possible to other men, while some of the rituals had a religious overtone: they were regarded as essential to the welfare of the deceased husband in the spirit world.[1] But the rules were enforced by the various law-enforcing agents in the society - male secret societies charged with the duty of enforcing laws, such as the egungun among the Yorubas,[2] and egbo among the Ibibios.[3] The legal status of women was also affected. For example, a woman could not remarry until she had observed the prescribed period of mourning for her deceased husband and performed the necessary ceremonies to symbolise the severance of the marital tie.[4]

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1. See Lieber, Ibo Village Communities, op. cit., p. 21; Kingsley, Travels in West Africa, op. cit., p. 487.

2. See Ajisafe, op. cit., pp. 30, and 90-94; Johnson, op. cit., pp. 138-140.

3. See Waddell, op. cit., pp. 421-423; Talbot, Life in Southern Nigeria, op. cit., p. 170; See Andre J.F. Kobben, "Law at the Village Level, The Cottica Djuka of Surinam", in Law in Culture and Society, edit. by Laura Nader (Berkeley: University of California Press, 1969), pp. 117-140, as to whether the term "law" should be used when the sanction is a psychological one, e.g. ostracism, ridicule, withdrawal of favours etc; cf. Frederick Pollock, First Book of Jurisprudence, 6th ed. (London: Macmillan and Co. Ltd., 1929), p.24; Maine, Early History of Institutions, op. cit., Lecture 12, p. 364 and Lecture 13,p. 380.

4. See Talbot, Tribes of the Niger Delta, op. cit., p. 222; "a woman may never give herself, or be given to, another man until the ceremony for her late husband has been completed" among the Igbo and Ibibio. "Any infringement of this rule is treated as a grave offence and entails terrible punishment and disgrace;" see also Basden, Among the Ibos of Nigeria, op. cit., p. 121; Kingsley Travels in West Africa, op. cit., p. 487; Boston, The Igala Kingdom, op. cit., p. 139, n.1.

B. The modern society

(i) Ceremonies performed by widows.

Widows in contemporary Nigeria are more fortunate than women in traditional society, with reference to nourning rites for their deceased husbands. Missionaries played an active role in the abolition of those laws which degraded the social status of women, especially in the Calabar area. With the advent of Colonial administration and the introduction of English laws, rude practices such as the burial of wives with their deceased husbands, and trials by ordeal were made criminal offences.[1]

The rigours formerly imposed on widows mourning for their deceased husbands, as well as the duration of the period of mourning, are considerably reduced in all areas of the country. Article six of a Treaty signed at Calabar in 1878, by the kings and chiefs of Duke Town provided:

> The custom of compelling widows to remain in their houses in filth and in wretchedness, after the death of their husband until his devil-making is over (they having been sometimes kept for even years in this state of misery), is abolished.
>
> The widows are to remain mourning for one month after the death of their husbands, and after that no further restraint will be put upon them.[2]

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1. See Ordeal, Witchcraft and Juju Ordinance, 1903, No.13 of 1903, S.2, and see further above, Chapter VII, p.572; see also Richard Burton, Abeokuta and the Cameroon Mountains: An Exploration, (London, Tinsley Brothers, 1863), Vol.II, pp. 4-6, for a treaty abolishing human sacrifice signed by the Alake and Chiefs of Ake; and Herslets, Commercial Treaties, Vol. IX for a treaty concluded on 5 Jan. 1852, with the Chief of the Egbas for the abolition of all forms of human sacrifice.

2. Macfarlan, Calabar; The Church of Scotland Mission Founded 1846, op. cit., p. 66; Waddell, op. cit., p. 422 et.al., Nair, Politics and Society, op. cit., pp. 50-54; cf. Begho, Law and Culture, op. cit., pp. 61-62.

This Treaty was the result of persistent pressures exerted by the missionaries on the kings and chiefs of Calabar and its environs. The success of their efforts is attested by evidence collected during field-work in Eket.

It has been previously noted that Ibibio widows were among the chief victims of oppressive traditional mourning ceremonies and taboos. Not only were they forced to observe excessively long periods of mourning in filthy conditions, but during the initial burial ceremonies they were flogged by the members of egbo (male secret society). Their clothes were torn, their faces defiled and all their household utensils broken. The laws imposed by the community were intended to make them as miserable as possible.

The position of widows in Eket and Calabar today is very different. Not only are women no longer subjected to floggings by egbo, but the period of mourning for a deceased husband is relatively short, or, in some cases non-existent. The process of change was illustrated by the experience of the women in a household interviewed at Eket. The household included four generations of women. The widow who represented the oldest generation, was about eighty years old. She stated that after her husband's death she had to mourn for five years, after undergoing all the traditional punishments. Her daughter, also a widow, had mourned for three years but suffered no degrading practices like egbo floggings, or rubbing of filth on her body. Her grand-daughter, however, who was married, but not widowed, stated that in her generation - the present one - "the husband whose wife mourns for him for one month would be regarded as extremely fortunate". The law had changed to such an extent that the saying "the mourning chamber is the same as the birth chamber", indicating that many widows became pregnant during the mourning period of one month, had become a popular jocular statement.[1]

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1. Information obtained in recorded interviews at Eket.

In many areas, for example Nsukka, where the population has always had an excess of males, the initiative to reduce the mourning periods for widows was taken by the men themselves. This was due to the fact that the long periods of mourning, and the abject state to which the widows were reduced increased further the imbalance between male and female as it affected the number of marriageable women available.[1]

The present mourning period generally lasts for one month. But in many areas, once the first burial of the husband has been performed, the widow is allowed to bathe and change her clothes. Most widows shave their hair off entirely, but if they do not, they may comb their hair during the period of mourning. In many areas, for example, Onitsha, a widow is also required to wear black clothing for a further period of six to nine months, but this is not compulsory. In Onitsha a wife is not permitted to remarry before the "second burial" of her deceased husband has been performed.[2] A "second burial" may be performed at any time after death, but since it involves considerable expenditure it may be postponed for years.[3]

(ii) Ceremonies performed by widowers.

The mourning rites imposed on husbands for a deceased wife have always been comparatively slight and of a short duration. For example, among the Ibo (Nnewi) in the past, the husband had to lament the death of his wife by night alarms sounded for about three (native) weeks.[4]

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1. Information obtained in recorded interviews at Nsukka.

2. See Basden, Among the Ibos of Nigeria, op. cit., p. 121; Meek, Law and Authority, op. cit., p. 311; Meek, Northern Tribes of Nigeria, op. cit., Vol.II, pp. 130-131; Boston, The Igala Kingdom, op. cit., p. 138.

3. See Meek, Law and Authority, op. cit., pp. 310-319.

4. See Basden, Among the Ibos of Nigeria, op. cit., p.116: "The outward signs of mourning on the part of males are not extravagant... A husband should restrict himself to the confines of his compound for seven Ibo weeks (28 days) when mourning the loss of his wife."

To sever the marital relationship with his dead wife the husband tears his necklace. After burial he has his hair shaven bald.[1]

9. The Refund of Dowry After Death

The rules governing the refund of dowry after the death of one of the spouses vary from community to community, and in most cases are similar to the rules applicable to a refund of dowry in the event of a divorce.

Generally, there is no liability to refund the dowry after a wife's death.[2] The wife's death not only terminates the personal contract between the spouses,but also frustrates the contract between the wife's family and the husband or his family.

Where the husband predeceases the wife, however, the general rule is that dowry is refundable, but there are some exceptions, and the rules vary even among sub-groups of the same group.

In some communities, there is no liability to repay any part of the dowry, even in cases where the widow marries outside her deceased husband's family.[3] In other communities, the obligation to refund the dowry only arises

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1. Ibid., p. 116. Cf. the position of widow and widowers in Sierre Leone, see Oliver Taylor - op. cit., p. 223.

2. See Customary Law Manual, op. cit., p. 302, par. 362(5). but see Akuonyeume and Anor. v. Ogbanje, [1964] Suit No. 0/98/1963, unreported, Onitsha High Ct., 2, Nov. 1964; where the plaintiffs alleged that the testatrix could not dispose of her self-acquired property by will to her own children, because she had not refunded the dowry. See further, below, Chapter XIII, p.

3. For example, in Ezzikwo Division, Orri, Effium and Eziagu clans and in Ezilo community in Igbo-Ato clan of Ishielu Division, refund of dowry is not made after the death of a husband, even where the wife marries outside her deceased husband's family, - see Customary Law Manual, op. cit., p. 302, par. 362(3).

where the widow marries a stranger.[1] In most of these communities where dowry is repayable, no refund is usually due until the widow remarries, but in a few communities, for example Owerri Division, as soon as the widow leaves her husband's family, the dowry is immediately repayable, regardless of the duration of the marriage, the number of children the widow had for her deceased husband, or the fact that she is too old to bear further children.[2] If she refuses to marry her husband's heir the dowry must be repaid.[3]

Recently, judges have modified the rule and have held that the dowry repayable should be reduced according to the circumstances of the particular case. The factors to be taken into account would include, inter alia, the duration of the marriage, the age of the woman, the possibility of her remarriage, the ages of the children, the services rendered by the wife to the husband when they were together, whether the person to whom the dowry was paid is still alive or not, and, in a divorce case, the causes and reasons for divorce.[4]

In Osiekiyovwe and Anor. v. Akporuvbeku,[5] the wife had been married to the husband for about twenty one years before his death, and had borne three children for him. After his death, she refused to marry his heir, and returned to her father's compound. Her father agreed with the heir, brother of the deceased husband, and plaintiff in the case, to refund £95 dowry. He paid £20 before he

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1. This is the position among the Yorubas generally, and among the majority of Igbo communities; see Customary Law Manual, op. cit., p. 302, par. 362(3).

2. See Customary Law Manual, op. cit., p. 302, par. 362(4)(b).

3. This is the position among the Tiv, but an allowance is usually made for children she has borne by the deceased, see Bohannan, Justice and Judgment Among the Tiv, op. cit., p. 87.

4. See Osiekiyovwe v. Akporuvbeku [1973] Law Notes and Review, 1973, No.1; see also Okaludo v. Omama [1960] W.L.N.R.149.

5. [1973] Suit No. UHC/6A.71, Law Notes and Review, 1973, No.1.

died five years later. His son, the first defendant, and brother of the second defendant, the widow, paid a further £25 after the death of their father, leaving a balance of £50, which formed the subject matter of the claim. When the claim was instituted, eight years had elapsed since the death of the husband. The Customary Court was divided in its judgment. The President of the court dismissed the action. The other member found for the plaintiff, but awarded him £40 only. The findings of the President became the judgment of the court. The plaintiff appealed to the Magistrates Court, Ughelli. The appeal was allowed, but the Magistrate reduced the amount of dowry repayable to £30 as against £50 originally claimed by the plaintiff. Against this judgment both parties appealed. Justice Ogbobine of the Ughelli High Court set aside the judgment of the Magistrates Court. In his judgment he said:

> Although there is no Native Custom which deprives a husband of a refund of his dowry, the Courts must be reluctant in encouraging a woman whose marriage has virtually failed to continue remaining with the husband for fear of having to refund her dowry, or the husband to continue to hold the wife in perpetual servitude on the failure of her parents to refund the dowry. There is no doubt that Customary Courts must be extremely cautious in determining what amount of dowry is refundable when a marriage breaks up.[1]

The Judge held that the £45 already refunded was adequate. He allowed the appeal of the defendants and restored the judgment of the Customary Court.

The Judge's statement that there is no Native Custom which deprives a husband of a refund of his dowry is not strictly true if applied to the whole of Nigeria, since there are societies where a husband is not entitled to such a refund. Nevertheless the passage is important in that it pinpoints the tragedy of a woman whose parents

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1. Osiekiyovwe and Anor. v. Akporuvbeku, ibid., p. 5.

cannot afford to refund dowry received for her, and suggests the attitude courts should take.

10. Summary and Recommendations.

A. Summary

Viewed from a legal point of view, the traditional position of the large majority of women in Nigeria in regard to divorce, presents a picture of near equality with that of their husbands. In legal theory, divorce could, in the majority of communities, be initiated and effected by the unilateral action of either spouse, and no specific grounds had to be established in order to obtain a divorce.

In actual fact, however, it was more difficult for a wife to obtain a divorce, than it was for her husband to divorce her. She had to seek for and obtain her family's approval; and this was not an easy task, since it usually meant the obligation to refund the dowry paid with reference to her marriage. If the dowry was not refunded the wife could not remarry. Because of the financial obligation to refund the dowry, pressures were brought to induce the wife to remain in a marriage which had become intolerable to her, in many cases.

Society regarded divorce as justifiable when effected by a husband for reasons which were not regarded as valid in the case of divorce by a wife. For example, a wife's adultery justified a divorce by the husband; the husband's adultery was dismissed as irrelevant.

A husband had the right to chastise his wife, and a divorce for cruelty was only justified if the cruelty was excessive or administered in an insulting manner. The wife, on the other hand, had no right of chastisement, and trivial acts, such as making love charms and potions, invariably done in an attempt to gain, or retain, her husband's love, would constitute cruelty on her part. No actual physical injury was necessary to justify a divorce on the ground of cruelty.

Unless the wife's economic contributions compensated for her sterility, a wife who had no children was liable to be divorced. Even if she was not divorced her position in a polygynous family was not an enviable one. Often the happier choice for a childless wife, or one who had no male children, was separation from her husband. On the other hand, society provided a remedy for the sterile husband. The wife was permitted, and in a few cases coerced to beget children by other men. These children were affiliated to the husband and if the transaction was secretly done, and in most cases it was the husband's dignity was protected.

Additionally, there were other influences operating to restrain a wife from effecting a divorce which were absent in the husband's case. The obligation to refund the dowry is particularly relevant in this respect. In some societies, a wife was required to take an oath, either during or before the marriage ceremony, or after the marriage, that she would never leave her husband. In many cases, superstition prevented her from effecting a divorce, even when the circumstances justified her doing so.[1] Unless the husband could be persuaded to release her from the oath, she had to remain with him for fear of the consequences which would result if she broke the oath.

In actual practice, therefore, the legal status of a wife with reference to divorce was less favourable than it was in theory.

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1. For example, it is a common practice in some parts of the country to subject a wife to a secret juju oath, by which she swears not to remarry unless the husband gives his consent and revokes the oath. Many cases of women who had divorced their husbands, but could not remarry because of superstitious fear of the consequences of the oath they had taken, were recorded in the Social Welfare Departments, especially in Anambra State. In some of these cases, the husband had effected the divorce, but still refused to release the wife from her oath, so that she can marry someone else; see The Ihiala Monthly Progress Report for August, 1976, October, 1976, and August 1977, where several such cases are reported.

On the credit side, however, it is undoubtedly the fact that divorce was relatively rare in traditional societies and the evidence seems to indicate that wives were reasonably treated and happily married. Although there were few specific law-enforcement agencies, several factors militated against a husband's excessive cruelty to his wife, or her unjustified expulsion from the matrimonial home. The influence of the family was one factor, but perhaps the greatest restrain was imposed on the husband by the sanctions of a close-knit society which generally frowned on divorce.

Women's traditional position under customary laws of divorce has changed to some extent, but generally, the changes are not beneficial. The old discriminatory provisions legally remain, and have even been endorsed in legislative enactments in some parts of the country.

The desire to curtail marital instability now evident in the country has prompted some local authorities to make stringent rules for obtaining a divorce.[1] These new laws, in most cases, are made and administered by men, and are therefore patently male-biased. In many cases, traditional laws favourable to the husband are retained, even when those laws are manifestly impracticable in the realities of the modern society. Laws favourable to the wife, however, are either totally abolished or severely curtailed. For example, the traditional legal right of a wife to non-judicial divorce has been abolished in some areas.[2] The similar right of the husband is, however, retained.

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1. See e.g. S.5(2) Declaration of Tiv Native Law and Custom, Order, N.R.L.N.149 of 1955; S.9, Declaration of Idoma Native Marriage Law and Custom) Order, 1959, N.A.L.N.63 of 1959; S.8. Declaration of Biu Native Marriage Law and Custom Order, 1964, N.R.L.N.9, of 1964; Benin Marriage Rules, op. cit.; S.7. Marriage, Divorce, and Custody of Children Adoptive Bye-Laws Order, 1958, W.R.L.N. 456 of 1958.

2. See e.g. S.8. Biu Native Authority (Declaration of Biu Native Marriage Law and Custom) Order, 1964, N.R.L.N.9 of 1964.

Some communities attempt to prevent divorce by imposing terms of imprisonment on a spouse who refuses to cohabit with the other spouse.[1] Although these provisions legally apply to both spouses, they may be oppressive to the wife, but not to the husband who is free to marry other wives. Such rules of law conflict with the provisions of the Constitution of the Federation of Nigeria which guarantees freedom of association to every citizen of Nigeria.[2] Marital stability cannot be enforced by oppressive laws.

Some communities still observe the traditional law and refuse the wife a divorce unless her husband consents, while no such restraints are imposed on the husband.[3] These laws do not prevent women from leaving their husbands. The stigma attached to divorce in the traditional society has disappeared. Marital status for women is still desirable, but if a woman has been married once, especially if she has some children, failure to remain with her husband does not affect her social status.[4]

The liability to refund the dowry in divorce has a debilitating effect on the ability of the woman to divorce an undesirable husband. The level of dowry which now obtains in some communities has aggravated the situation.

B. Recommendations.

It has been previously recommended that the payment of dowry should not be a legal essential of a

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1. See The Benin Marriage Rules, op. cit., S.8 3D., which provides: If a man wins an action for restitution of conjugal rights and the woman fails to obey the order of the court, the man may take a criminal summons for failure to obey a court order, and the court may commit the woman to prison or inflict a fine.

2. S. 39.

3. See Forde and Jones, The Ibo and Ibibio-Speaking Peoples, op. cit., p. 77.

4. Ibid., p. 77.

customary marriage in contemporary Nigeria. Similarly the refund of dowry should not be the sine qua non of a valid divorce. On the death of either husband or wife a marriage should be legally dissolved, and a wife permitted to marry to anyone acceptable to her, without a refund of dowry. Any children she subsequently conceives should be legally affiliated to their natural father whether dowry has been refunded or not.

In the discussion on statutory marriage and divorce it will be seen that a divorce may be effected by the mutual consent of both parties, or by the unilateral desire of either spouse to terminate the marriage. This as previously noted has been the position in most Nigerian customary law systems. Informal divorce by mutual consent should be retained, accompanied by the compulsory registration of such divorces.

No marriage should be sustained by the law where it is obvious that the marriage has broken down irretrievably. Evidence of irretrievable breakdown should be the refusal of one spouse to continue to cohabit or to maintain a marital relationship with the other. His or her reasons for doing so should be largely irrelevant, except where it is felt that a reconciliation is possible. Attempts should be made to reconcile the parties. Where possible, or advisable, the spouses' families may be invited to participate in reconciliation attempts. In addition, there should be trained marriage guidance counsellors to advise the parties and the courts.

No person should be forced to cohabit with another person or be imprisoned for his or her refusal to do so. The only basis for a marriage should be the desires of the spouses to get married or to remain married. Where one spouse desires a divorce but the other does not, the objecting spouse should be notified of his or her right to appeal to a Customary Court against a registration of divorce, but only for the purpose, if possible, of effecting a reconciliation.

VOLUME II

THE LEGAL STATUS OF NIGERIAN WOMEN
with special reference to marriage.

by

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PART THREE

IMPORTED FORMS OF MARRIAGE: THEIR EFFECT ON THE STATUS OF WOMEN

CHAPTER IX

MARRIAGE ACCORDING TO ISLAMIC LAW

"Woman is like a rib: if you want to straighten her out, you will break her, and if you want to use her, you must use her with her curve".[1]

Sahih of al-Bukhari

1. Introduction

A brief historical account of the incursion of Islam into Nigeria, as well as of the general nature and sources of Islamic law has already been given.[2] This chapter examines the impact of Islamic law on the traditional legal status of those women who are Moslems.

As a general statement, it may be said that the impact of Islamic law on the traditional position of women, so far as it relates to marriage and family life has not been revolutionary, since basically, Islamic law as it is applied in Nigeria, does not differ significantly from the indigenous customary laws of the various Nigerian communities.

Before discussing the provisions of classical Islamic law[3] relating to marriage, and the extent to which these principles of law have been discarded or distorted in deference to local customary laws, certain general points must be noted.

2. The nature and Applicability of Islamic Law.

A. The General Nature of Islamic Law.

The core of the Islamic law of marriage is

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1. O. Houdas, Les Traditions Islamiques, French, trans. by, 1908. Vol. III, p. 583.
2. See above, Chapter II, pp. 189-192.
3. The law as laid down by the Koran and classical jurists. The term "classical" is used to distinguish Islamic law actually practised in Nigeria from the law of the Koran and classical jurists.

ancient Arabian customary law.[1] As shown in previous chapters, the customary laws of patrilineal traditional societies in all parts of the world show few significant differences in the general principles of marriage, family life, and the position of women. Islamic law, as a result, portrays striking similarities to the traditional indigenous customary laws of many of the converts to Islam. This, perhaps, explains why the fusion of Islamic and customary law has, comparatively speaking, been easier to accomplish than the fusion of English law with either of the two, at least as far as family law is concerned; it may well also account in part for the success of Islam as a proselytising religion in Africa.

During the pre-Islamic era in Arabia, the customs regulating marriage and the relationships between the sexes were vague and indefinite, and there is evidence that polyandry, polygamy, marriage by capture, illicit connections, temporary marriage, and frequent divorces were common.[2]

At one time in the ancient past Arabian women had played a dominant role in social relations. For example, it was possible for a woman to have sexual intercourse with a number of men, and on the birth of a child, she had the sole right to assign it to any one of them. Her paramours had no right to refuse paternity, when thus assigned.[3]

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1. See Fyzee, Outlines of Muhammadan Law, op.cit., p.25;
2. See Joseph Schacht, An Introduction to Islamic Law, op.cit., p.7; Ullah Ibns Jung, A Dissertation on the Muslim Law of Marriage, (Allahabad: Law Journal Press, 1926), p.iii; Reuben Levy, The Social Structure of Islam, (Cambridge: Cambridge University Press, 1957), p.121.
3. See Jung, op.cit., p.iv; Alexander D. Russell and Abdullah A. Suhrawardy, First Steps in Muslim Jurisprudence consisting of excerpts from Bakurat-al-Sa'd of Ibn Abu Zayd (London: Luzac and Co., 1906), p.xv; (Reuben Levy, Social Structure of Islam, op.cit.91, et al; Abdur Rahim, The Principles of Muhammadan Jurisprudence According to Hanafi, Maliki, Shafi'i and Hanbali Schools (London: Luzac and Co., 1911), pp.7 - 8.

The power of divorce was not limited to men. Women also had the power to divorce their husbands by the simple expedient of turning their tents around so that if the door had previously faced the east, it faced the west instead. This action signalled dismissal which had to be accepted by the husband.[1]

By the time of the Prophet Muhammed, however, women had lost their once dominant position, and their status was said to be "no better than that of animals".[2] In youth, they were the chattels of their fathers, and after marriage the husband replaced the father as their lord and master;[3] a woman was an integral part of the estate of her husband or her father, and the widows of a man descended to his sons by right of inheritance, as any other portion of his patrimony.[4] Polygamy was unrestrained and limited only by lack of means or inclination, while the power of divorce, denied to women,[5] was frequently and indiscriminately exercised by men.[6] Female infanticide to avert the shame of producing girls was prevalent.[7]

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1. See W. Robertson Smith, Kinship and Marriage in Early Arabia, 2nd. edit. (Cambridge: Cambridge University Press, 1907), p.65; Ameer Ali, Mohammedan Law, compiled from Authorities in the Original Arabic, 5th edit. (Thacker, Spink and Co., 1929), Vol.II, p. 4. See generally, Levy, op.cit., pp.91-134.
2. Levy, op.cit., p.91; Fyzee, Outlines of Muhammadan Law, op.cit., p.6. See generally, Abdur Rahim, op.cit., pp.7-12; Schacht, Introduction to Islamic Law, op.cit., pp.6-9; Ameer Ali, Mahommedan Law, op.cit., pp.15-17.
3. Levy, op.cit., p.91.
4. Ameer Ali, op.cit.,p.15; B.A. Rafiq, The Status of Women in Islam (London: Orchard Publications, 1975), p.6.
5. Abdur Rahim, op.cit.,pp.9-10; R. Smith, op.cit., p.291.
6. Levy, op.cit., p. 121.
7. Abdur Rahim, op.cit.,p.12; R. Smith, op.cit.,p. Rafiq, op.cit.,pp.6-7. See also Farin Mirvahabi, "The Status of Women in Iran", 14 Journal of Family Law, 1975-1976, pp. 383-404; Levy op.cit., p. 91-92.

An Arab could dispose of all his property by will and the cardinal rule of inheritance, also found in the majority of traditional customary legal systems, was that no female could inherit from her father or from her husband.

Arab customary law, like Yoruba customary law, recognized the right of all adults to hold property. Although a woman was debarred from inheritance, she was under no disability in the matter of owning property. It was possible, as in Yorubaland, for women to acquire riches by trade and commerce and to become the owners of land and houses.

A woman, however, was not free to contract her own marriage. Marriage was an alliance between families and the father or other male guardian of a woman, regardless of her age or marital status, had the right to give her in marriage to the man of his choice. Her consent was unnecessary. Money or other property given by the bridegroom in consideration of the marriage belonged to the bride's father.[1] In short, the position of women in Arab customary law was very similar to the position of women in the traditional customary law as shown in the foregoing chapters.[2]

Jung records the fact that "the process of the subjection of the women and children was totally complete before the dawn of Islam, and the endeavours of the Prophet of God were to emancipate the woman from hereditary bondage, restore her position, and give her a legal status in the eye of the law".[3] But all religions tolerate, and even encourage in some respects, the predominance of the male over the female,[4] and Islam is no exception. The Koran states that

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1. See Abdur Rahim, op.cit., p.9.
2. See Part Two above, Chapters III-VIII.
3. Jung, op.cit., p. xiii.
4. Ibid., p. xiv.

> "Men are superior to women on account of the qualities with which God had gifted the one above the other, and on account of the outlay they make from their substance for them".[1]

Muhammad recognized, and in some cases reinforced, the notion prevalent in most societies of his time, that men were superior to women. This is explicit in many provisions of the Koran. For example, in the laws of succession, a male gets double the inheritance rights of a female, and in the law of evidence two female witnesses may be required instead of only one male witness.[2] However, Muhammad made some attempts to ameliorate the total subjection and degradation of women under the existing Arabian customary laws of his time, and many of his reforms, if liberally interpreted, were advantageous to women. Islamic law did not profess to establish a new system of law, nor do the legal verses of the Koran represent a complete set of legal principles. They are largely either general exhortations, or solutions to specific problems that arose from time to time. The aim of the Prophet "was not to create a new system of law; it was to teach men how to act, what to do, and what to avoid in order to pass the reckoning on the day of Judgement and to enter Paradise"[3] The reasons for the Koranic legislation on marriage and family life were said to be "dissatisfaction with prevailing conditions, the desire to improve the position of women, of orphans, and of the weak in general," to restrict the laxity of sexual morals and to strengthen the marriage tie[4].

The entire pre-Islamic customary laws were retained, subject only to such changes as Muhammad decreed.

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1. The Koran, trans. by J.M. Rodwell, (London: Dent, Everymans' Library, 1974), Sura, IV, V.38, p.415.
2. According to Maliki law, a woman may not be a witness to a marriage, nor to a divorce, see F.H. Ruxton, Maliki Law. (London: Luzac and Co., 1916, p.90.)
3. See also Abdur Rahim, op.cit.,p. 16.
4. See Levy, op.cit., p. 100.

Only such customary laws as were inconsistent with the principles of sound reason and good conscience were repealed.[1] Islamic law acted more or less in the same way on Arabian customary law as equity did on the English common law. It did not replace customary law in its entirety, but was simply a gloss, which modified or occasionally replaced customary principles, and made them more acceptable to a religious legal system.[2]

According to Ameer Ali

> "The Prophet, in his efforts to introduce a purer faith and a healthy organization among his people, did not so entirely overlook the exigencies of society and the requirements of human growth as to denounce all existing institutions, the inevitable result of which would have been to reduce everything to chaos. His constructive mind perceived in them the germs of development, and accordingly he allowed them a place in his system, with such modifications and alterations as would bring those institutions into harmony with a progressive condition of society".[3]

In many cases prudence dictated the adoption of a middle course which would be more acceptable, and therefore more likely to be observed by converts, even when total abolition was desirable. For example, Muhammed did

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1. Jung, op.cit.,p. ii; but see Coulson, "Custom and Case Law", World of Islam, Vol.VI, pp.13-14; "Customs which were in direct conflict with the principles derived from the koran or the sunna or by analogical reasoning based thereupon nevertheless found their way into the body of the positive law".

2. This is generally the view of the Sunnis schools of law, according to the Shi'a, however, any rule of customary law not expressly ratified by the Koran was tacitly rejected, see N.J. Coulson, Conflicts and Tensions in Islamic Jurisprudence, (Chicago: University of Chicago Press, 1969), p.32; Norman Anderson, Law Reform in the Muslim World, (London: The Athlone Press, 1976), p.10; Anderson, "The Adaptation of Muslim Law in Sub-Saharan Africa, in African Law, Adaptation and Development, edit. by Hilda Kuper and Leo Kuper (Los Angeles: University Press, 1965), pp.149-150; Tyabji, Muhammadan Law, op. cit., pp.2-10.

3. Ameer Ali, Mahommedan Law, op.cit., p.1.

not approve of polygamy, but he did not prohibit it. He restricted the permitted number of wives to four, and hedged this permission with a proviso that all the wives should be treated equally. Some jurists interpret this condition in such a way as to make the practice of polygamy impossible.[1]

B. The Applicability of Islamic Law in Nigeria

It has been previously stated that in Nigeria, Islamic law has always been de jure a particular type of "native law and custom",[2] and, until 1957, when the Moslem Court of Appeal came into force there was scarcely a reference to Islamic law as such in any Nigerian statute. Anderson notes:

> "It would at first sight seem somewhat of an anomaly that the Ordinances of a territory in which, so far as its Northern Provinces are concerned, Islamic law is in fact applied more widely than in any other part of the British Empire, except the Aden Protectorate, should include virtually no reference whatever to that law".[3]

Islamic law is applied under the provisions concerning the application of native law and custom. Thus the High Court Law 1955, of the former Northern Region of Nigeria provides:

> "The High Court shall observe, and enforce the observance of, every native law and custom which is not repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom".[4]

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1. See further below, pp. 23-28.
2. See above, Chapter II, p. 189.
3. Anderson, Islamic Law in Africa, op.cit., p. 171.
4. Cap. 49, Laws of Northern Nigeria, 1963 Revision, S.34(1).

The Native Courts Law, 1956, expressly provides that "native law and custom includes Moslem law".[1] Section 23 of the Law provides:

> "Subject to the provisions of this Law, and in particular of section 24, a native court shall in civil causes and matters administer -
>
> (a) The native law and custom prevailing in the area of jurisdiction of the court or binding between the parties, so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written law for the time being in force".

If no native law and custom is applicable to any particular matter in controversy, "the court shall be governed by the principles of natural justice, equity and good conscience".

The designation of Islamic law as native law and custom has been confirmed by judicial[2] and academic authority".[3] The 1963 Nigerian Federal Constitution refers to "Moslem law or other customary law".[4] As already mentioned there has been protests against the lumping of Islamic law with customary law,[5] and it is significant that the Federal Constitution 1979, speaks of "Islamic law and customary law",[6] thereby recognizing that Islamic law is not customary law. In view of this it is questionable

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1. No. 6 of 1956, Cap. 78, Laws of Northern Nigeria, S.2; See also High Court Law, Cap. 49, Laws of Northern Nigeria, 1963 Revision, S.2.

2. See Adesubokan v. Yinusa [1973] 3 U.I.L.R.22., where the Supreme Court stated that the definition of native law and custom in Northern Nigeria includes Moslem Law. See also Ayoola and Ors. v. Folawiya and Ors.[1942] 8 W.A.C.A. 39.

3. See Anderson, Islamic Law in Africa, op.cit.,pp.171-183. Nwogugu, Family Law in Nigeria, op.cit., p.xxiv; Keay and Richardson, The Native and Customary Courts of Nigeria, op.cit., p.228; Kasunmu and Salacuse, Nigerian Family Law, op.cit.,pp.21-22; In this respect see the recommendations of the Area Courts Reform Committee, 1976; see further, above, Chapter II, p.189, n.3.

4. See Federal Constitution of Nigeria, 1963; Item 23, Exclusive Legislative List, cf. Constitution of the Federal Republic of Nigeria, 1979, Item 58 which speaks of "Islamic law and customary law".

5. See above Chapter II, p. 189, n.3.

6. See Constitution of the Federal Republic of Nigeria,

footnote continued .....

whether it can now be said that Islamic law is de jure customary law.

C. The Nature of Islamic Law in Nigeria

Ruxton asserts that "with no exception, every Muhammadan in British West Africa belongs to the Maliki School and it is that law which alone prevails".[1] How true this assertion may be for the whole of Nigeria is debatable,[2] but it is the consensus of opinion that the Maliki School generally applies in the Northern States. Thus Lord Lugard, in his Political Memoranda, notes that there are many schools of Moslem Jurisprudence founded on the Koran, but the Maliki Code is the one adopted by the Moslems of the Northern Provinces.[3]

Mention has already been made of the fact that there are various schools of Islamic law.[4] One of these schools, the Sunni School, has four sub-schools, the second in point of time of which was founded by the scholar Malik ibn Anas, who developed Islamic law and practice in Medina,[5] and is the author of the first comprehensive law book to survive.[6] His School is predominant in Upper Egypt, North and West Africa, including Nigeria.[7] The school was founded in the second century.[8] The law

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Footnote 6 continued.....1979, Item 58 Exclusive Legislative List, Second Schedule, Part I.

1. Ruxton, Maliki Law, op.cit., p.vi.

2. See Trimmingham, Islam in West Africa, op.cit., pp.230-232, for a brief description of the Ahmadiyya: a modern Islamic Missionary movement which was first introduced into Nigeria in 1916; see also Ashodi v. Ashodi [1963] 2 All N.L.R. 214 where the defendant was allegedly married under Yoruba Islamic law and custom pertaining to the Ahmadiyya; see Edward G.S. Parrinder, Religion in an African City, (London: Oxford University Press, 1953), pp.76-80.

3. See Lugard, Political Memoranda, op.cit., p.92; Report of the Native Courts, Western Provinces, Commission of Enquiry, 1952, p.18; Sharia Court of Appeal Law, 1960, Cap. 122, S.15. See also Apatira and Anor. v. Akanke [1944] 17 N.L.R. 149; cf. Ayoola and Ors. v. Folawiyo and Ors.[1942] 8 W.A.C.A., 39.

4. See above, Chapter II, p. 192.

Footnotes 5, 6, 7 and 8 continued.....

actually applied in the Native Courts in the Northern States is not the pure Islamic law contained in the Maliki Code, but an admixture of indigenous customary law and Islamic principles. Various writers have attested to the mixed nature of Islamic laws applied in West Africa. Anderson points out that "in some localities Islamic law has become as inextricably combined with indigenous law as has Arabic with the indigenous language in Kiswahili".[1] Trimmingham observes that in West Africa, "social life is ruled primarily by custom often in contradiction to the absolute laws of Islam".[2] Lord Lugard, in his instructions to political officers observes:

> "The administration of Moslem Law is modified by the local law and custom in Pagan Districts, provided that by so doing the Judge does not directly oppose the teaching of the Koran. There is no doubt that even in Moslem Districts, the law, as administered today, especially in the Emir's Judicial Councils, is often modified by recognition of the Native law and custom which has been much influenced by the system the Fulani found in operation at the time of their conquest".[3]

Traditionally, Islamic Jurists have always taken full cognizance of the force and validity of customs. "That which is established by custom is also regarded as established by the law",[4] provided the custom is not opposed to a clear

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Footnotes 5, 6, 7 and 8 continued.....

5. See Alfred Guillaume, Islam (London: Penguin Books, reprint, 1977), pp.94, 95, 102; R.K. Wilson, Anglo-Muhammadan Law, 5th edition (London: Thacker, Spink & Co., 1921), p.11.
6. Guillaume, op.cit., p.102.
7. Guillaume, Islam, op.cit., p.102; Vesey-FitzGerald, Muhammadan Law: An Abridgement, according to its Various Schools (London: Oxford University Press, 1931), pp.13-14.
8. See Fyzee, Outlines of Muhammadan Law, op.cit., p.26.

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1. Anderson, Islamic Laws in Africa, op.cit., pp.3-4.
2. Trimmingham, Islam in West Africa, op.cit., p.126.
3. Lugard, Political Memoranda, op.cit., p.92.
4. Jung, op.cit., p.iii.

text of the Koran or of an authentic tradition. A custom which is immemorial, continuous, certain, reasonable and consistent with the Koranic injunctions will always be upheld.[1]

It is therefore not as strange as at first sight it may seem that in Nigeria Islamic law is generally included under the provisions concerning the application of "native law and custom".[2] Even in Maiduguri, which is essentially a Moslem town,[3] observance of local customs in marriage and family life is not insignificant. Interviewees in Maiduguri stated that customary law is generally followed, except where the practice is forbidden by Islam, but in fact customary and Islamic law principles are so interwoven that many of the younger generation of Moslems there would have considerable difficulty in assigning the rules to one or the other system of law. For example, the simple method of marriage permitted by Islamic law is not generally followed by Nigerian Moslem communities, and the tendency is towards a fusion of the civil contract with indigenous social and religious rites. The legal essentials of offer and acceptance of marriage, in the presence of witnesses are observed, but in addition, elaborate social celebrations which vary considerably in different tribes and areas, and which are customary in origin, are also performed.

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1. Ibid., p.iii; Abdur Rahim, op.cit., p.55.
2. See Native Courts Law, 1956; Cap. 78, Laws of Northern Region of Nigeria, 1963 Revision, S.2 which provides that "native law and custom includes Moslem Law". See also Federal Constitution, 1963, Item 23 Exclusive Legislative List; Zaidan v. Mohssen [1973] N.M.L.R., 427; [1973] All N.L.R. 86, where it was stated that customary law includes Moslem law. Compare Surah v. Sagnia [1956] 1 W.A.L.R. 97, a Gambian case, where Islamic law was treated as customary law.
3. Trimmingham notes that Sokoto and Maiduguri are Moslem towns in the same way as Fez or Tripoli; see Islam in West Africa, op.cit., p.126.

This fusion of Islamic law and local customary law, insofar as it relates to marriage and family life, is one of the reasons why the position of women under Islamic law of marriage, does not differ greatly from that of women married under indigenous customary law.[1]

D. Persons to whom Islamic law applies

Generally, Islamic personal law only applies to Moslems. This is so even in the Northern Emirates where the population is predominantly Moslem.[2]

> "Any person who professes the religion of Islam, in other words, accepts the unity of God and the prophetic character of Mohammed is a Moslem and is subject to the Musulman law".[3]

A person may be a Moslem by birth to Moslem parents, or by conversion.[4]

In the Sudan, persons who preserve to some extent their own customary laws, even when these are inconsistent with the provisions of Islamic law, for example, persons who marry more than four wives without a divorce, or practise levirate marriage, but who nevertheless accept the above basic religious tenets, are considered Moslems.[5]

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1. See Alan Lethbridge, West Africa the Elusive, (London: John Bale, Sons and Danielsson Ltd., N.D.), p.233 who notes that "Mohammedanism is far more easy of assimilation by the Pagan than Christianity".
2. See Map 8, Chapter I, p.194.
3. Ameer Ali, op.cit., p.22; Narantakath v. Parakkal [1922] 45 Madras, 986; Asaf A.A. Fyzee, Cases in the Muhammadan Law of India and Pakistan (Oxford: Oxford Clarendon Press,1965), p.57; Abdur Rahim, op.cit., pp.248-249.
4. Abraham v. Abraham [1863] 9 M.I.A.199, 239-240; Fyzee Cases, p.39, 46-47; Chandrashekharappa v. Government of Mysore, A.I.R. [1959] Mysore, 26.
5. Farran, Matrimonial Laws of the Sudan, op.cit., p. 36.

The position is the same in Nigeria. In Lawal v. Younan,[1] the deceased who had nine wives was described as a "strict Moslem and an Alhaji". His status as a Moslem was not disputed, although the legality of some of his marriages was regarded as doubtful by the Court.

In Nigeria, converts to Islam are Moslems, as well as persons born to a Moslem father.[2] The position of a child born to a Moslem mother and non-Moslem father is not clear. Islamic law does not permit marriage between a Moslem woman and a non-Moslem man, and consequently, any offspring of such a union would be regarded as illegitimate.[3] The vast majority of non-Moslem women married to Moslem men in Nigeria, convert to Islam, and are governed by Islamic law.

In theory, Islamic law should apply to all Moslems. In Nigeria, however, Islamic law is applied territorially rather than on a personal basis.[4] Its judicial application is confined mainly to the Moslem Emirates of the North, and its practice, at least in marriage and family life is not observed by Moslems who are indigenes of the Southern States, for example, the Yorubas, although some Yoruba communities are predominantly Moslem. It is therefore convenient to discuss the application of Moslem law in (1) the Northern States and (2) the Southern States.

(1) The Northern States

As a general statement it may be said that Islamic

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1. [1959] W.R.N.L.R. 155, [1961] 1 All N.L.R. 245.
2. Information given by Alhaji Yusuf Wali of the Department of Islamic Studies, University of Maidugari, at an interview held on 12th December, 1977, at Maidugari.
3. See below, p. 14; Himat Bahadur v. Sahebzadee [1870] 14 W.R. 125; see also Ameer Ali, op.cit.,Vol.II, p.235; Neil B. Bailee, Digest of Moohummudan Law,(1875) p.42.
4. See Anderson, Islamic Law in Africa, op.cit.,p. 222.

law is applied to all Moslems in the Northern States, although as previously stated, the actual practice of the people is not pure classical Islamic law, but a mixture of Islamic law and the traditional customary law of the particular community. Islamic law is observed especially in matters concerning marriage and family life. For example, 106 Kanuri households were visited during field-work for this thesis, in Maiduguri and its environs. All the members of the households professed the Moslem religion and the marriage and family life of the persons interviewed were governed by Islamic law. Informants stated that it would be difficult to find a Kanuri who is not a Moslem, or who does not practise the Moslem law of marriage.[1]

There is evidence, however, that in some parts of the Northern States customary law may be applied to Moslems. For example, in Mariyama v. Sadiku Ejo,[2] both parties were Moslems belonging to the Igbirra community. The appellant was the divorced wife of the respondent, and she had remarried as soon as the dowry had been refunded to the former husband, instead of observing the period of chastity said to be ten months imposed by Igbirra customary law on a divorced woman before she can contract another valid marriage. A child was born to the divorced woman about fifteen months after she and her former husband last had intercourse, but less than ten months after the divorce. The period of chastity imposed on a divorced wife (idda) before she could legally remarry according to Islamic law was stated as ninety days by the Assessor, an Igbirra and also a Moslem.[3] The divorced hus-

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1. See Report of the Area Court Reform Committee, 1976, which found that Area Courts try as high as 99% of all civil cases in some parts of Northern Nigeria; 95% of all cases, civil and criminal are tried by the Area Courts in the Northern States, see Adrian Collett, "Recent Legislation and Reform Proposals for Customary and Area Courts in Nigeria", [1978] J.A.L. Vol.22, No. 2., pp.161-166.

2. [1961] N.R.N.L.R. 81.

3. The period of iddat for a divorced non-pregnant wife is three menstrual periods or, if the wife does not menstruate, three months; for a non-pregnant widow four months and ten days. It is evident from cases brought

footnote 3 continued.....

band claimed, and was awarded the child, by the Customary Court, in accordance with Igbirra law and custom, whereby a child born within ten months of a divorce belongs to the divorced husband. Since the parties were both Moslems, it was suggested that Islamic law should apply.[1] On appeal it was held that

> "From their conduct throughout and from the way the parties both speak now it is clear that they consider themselves bound by Igbirra native law and custom in this matter, and not by Muslim law. We therefore consider that Igbirra native law and custom is applicable".[2]

The above cases may be compared with Asiata v. Goncallo,[3] in which it was held that Islamic law should govern the distribution of the estate of a deceased resident of Lagos, who had lived all his life as a devout Moslem, and had plainly considered himself subject to Islamic law.

Islamic law is not generally applied to civil cases involving non-Moslems in the Northern States. In Dejo v.Agundiwin,[4] the parties were both Yoruba non-Moslems married according to customary law. The suit concerned the custody of a child. The trial court said that in the absence of evidence on Yoruba customary law it was applying "righteousness". The High Court held this to be the wrong approach. It held that the trial Court was required by section 20 (1) (a) of the Area Courts Edict to apply either the native law and custom prevailing in the area of the jurisdiction of the court or the law binding between the parties. The first duty of the court

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Footnote No. 3 continued..... to the Social Welfare Office, however, that most Moslems regard three months ten days as the minimum period for a divorced non-pregnant wife. See further below, pp.105-106.

1. Under Islamic law, the child could have belonged to the second husband in law, since the minimum period of gestation is said to be six months, see further below, p.74.
2. In the event, the Court refused to apply the Igbirra provision on the ground that although it was basically sound and almost in every case would be fair and just, in the very exceptional circumstances of this special case it was contrary to natural justice, equity and good conscience. See further, above Chapter I, p.

footnotes 4 and 5 continued.....

was said to be to decide which law to apply, and if it held Yoruba law applicable, it should have made use of Assesors. A retrial of the case was ordered.

Similarly, in Osuagwu v. Dominic Soldier,[1] the Moslem court in Kaduna decided in accordance with Moslem law, a civil suit in which the native law and custom of both parties was that of Okigwe (Igbo) community. The High Court held on appeal that section 23 (1) (a) of the Native Courts Law, 1956, provides a court with two alternatives, it may try the case by the native law and custom prevailing in the area of jurisdiction of the court, or by the native law and custom binding between the parties. Since in Kaduna there is no law and custom which prevails in the area of jurisdiction,[2] if the Moslem Court tried the case, it should apply the native law and custom binding between the parties. The court had no power to determine the case by Moslem law.

In Igwe v. Garba na Alhaji,[3] Garba, (a Moslem) sued Igwe (an Ibo non-Moslem) as surety for a debt owed by a third party. The court applied Moslem law, and after Garba had called two unimpeachable witnesses to support his claim, gave judgment for Garba, without giving Igwe an opportunity to rebut Garba's case by giving evidence, or calling witnesses. This procedure was correct in Moslem law. On Appeal, it was held that, applying section 21 (1) of the Area Courts Edict, no Native Law and Custom applied, and that the trial court should be governed by the principles of natural justice, equity and good conscience. It was further held that as Moslem law did not apply, it was not a Moslem case within the meaning of the Area Courts (Civil Procedure) Rules of 1971, and Part I of Order II did not apply. Being a "non-Moslem case", the trial court was bound

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Footnotes 3 and 4 continued .....

3. [1900] 1 N.L.R. 42.
4. [1973] Suit No. J.d/29A/72, decided on 20th March, 1973 by Reed, C.J. Benue Plateau State High Court.

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1. [1959] N.R.N.L.R. 39.
2. The area was the cosmopolitan sabon gari where most of the southern immigrants live when they reside in the Northern Emirates. Since the population is mixed there is no prevailing customary law.
3. [1973] Suit No. NCH/45A/72, unreported, 8 March, 1973.

to apply Part II of Order II, and by rule 8 thereof, the trial court was requested to call upon Igwe to make his defence, and to allow him to give evidence and call witnesses.

In criminal law, however, before 1959, non-Moslems were governed by Islamic law in the Moslem Emirates of Northern Nigeria. In Ekpo v. Kano Native Authority,[1] the appellant, a native of Calabar and a non-Moslem, contended that the Court of the Emir of Kano had no jurisdiction to try him. It was held, inter alia, that the Emir of Kano's Court had jurisdiction over all persons who were within the area of the native authority's jurisdiction, and whose general mode of life while there was that of the general native community. Although the appellant was not a Moslem, the Court had jurisdiction to try him by Moslem law. Since 1959, customary criminal law, including Islamic law, has been replaced by the Penal Code[2] in the Northern States. Islamic criminal law as such is therefore no longer applied.[3]

The position in the Northern States may be summed up as follows:

(a) generally, Islamic law applies to all Moslems, especially in the far Northern Emirates, for example, Borno, Sokoto and Kano.[4]

(b) if, however, there is evidence that from the conudct of the parties, they consider themselves to be bound by customary law, Islamic law will not be applied even where both parties are Moslems.[5]

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1. [1957] N.R.N.L.R. 129; see also R. v. Ilorin Native Court ex parte Jimo Aremu [1953] 20 N.L.R. 144, where it was held that for criminal purposes Islamic law prevailed in Ilorin Emirate.

2. Cap. 89, Laws of the Northern Region of Nigeria, 1963 Revision.

3. See J.N.D. Anderson, "Islamic Law in Africa: Problems of Today and Tomorrow", in Changing Law in Developing Countries, edit. by J.N.D. Anderson, op.cit.,pp.164 et.al.

4. See Constitution of the Federal Republic of Nigeria (Enactment) Decree, 1978, S,242 (2) which sets out the jurisdiction of the Sharia Court of Appeal. Cf. S.247, which sets out the jurisdiction of the Customary Court of Appeal.

5. Mariyama v. Sadiku Ejo [1961] N.R.N.L.R. 81.

(c) where both parties are non-Moslems, Islamic law does not apply.[1]

(11) The Southern States

The position is very different in the Southern States. Anderson notes that no specifically Moslem court, nor any formal application of Islamic law is known throughout the South, even in those areas where the proportion of Moslems is high, as for example among the Yorubas, who do not generally observe Islamic law in matters concerning marriage and family life. This phenomenon can be illustrated with reference to Ibadan.

In the 1953 and 1963 census, the population of Ibadan Province was shown as 58.2 and 62.4 percent respectively, Moslem, compared with 28.3, and 32.2 percent Christian, and 13.5 and 5.4 of other religions.[2] The percentage of Moslems may be even higher in Ibadan City Area. Of 1,116 marital cases examined by the present writer in Ibadan Customary Court Grade B, which were decided in 1976, 958 (85.8 percent) of the women involved swore on the Koran. Swearing on the Koran signified that formally they were Moslems, but the legal essentials and incidents of their marriages, as well as questions of divorce, paternity and the custody of children, were all governed by Yoruba customary law as modified by the Marriage, Divorce and Custody of Children Bye-Laws. In no case was any aspect of Islamic law cited, much less applied, even though the circumstances warranted such application. For

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1. Osuagwu v. Dominic Soldier [1959] N.R.N.L.R. 39.

2. See Population Census of Nigeria, 1952-53, Summary Tables, p.9; Population Census of Nigeria, 1963, West, Vol.2, pp.102-124; cf. the Report of the Native Courts, Western Provinces, Commission of Enquiry, 1952, which stated that the number of Moslems in the Western Region is relatively small; see also Burns, History of Nigeria, op.cit.,p.35, who asserts that Yorubas are still mainly pagans". Actual number of population for Western Region are 21.4 and 43.4 percent Moslems in 1952-53 and 1963 censuses respectively, compared with 73 and 71.7 percent Moslems in the Northern Region in 1952 and 1963 respectively.

example, in Oladejo Akindele v. Aduke[1] the divorced husband sought an order of the court that his former wife, whom he claimed, was pregnant with his child, should remove from the home of her lover to her parents' home, until such time as she had delivered the baby. The Judges refused to grant the order on the ground that, since the woman had divorced him and refunded his dowry, the former husband had no right to direct where she should live. The judgment stated:

> "The act of the Mover [plaintiff] in this motion is against fundamental human right. It will be a great injustice to curtail or curb the movement of the Respondent who is no more the Mover's wife".

This decision is contrary to Islamic law, which provides that the divorced husband of a pregnant wife has the right of control over his wife until her delivery, and may even require her to remain in his home during the period of gestation (idda). The husband also has a corresponding duty to maintain his divorced wife during this period.[2] Since both parties were Moslems, Islamic law should have been applied, but was not.

The letter of the Muslim Congress of Nigeria to the Brook Commission stated that in Ibadan "over four thousand cases of divorce, ninety-five percent of them between Muslims, were handled annually by two native courts which separated couples like dogs without regard to the instructions laid down by the Holy Qur'an".[3] The law seems to be the same in other areas.

In the case of In the Estate of Aminatu Alayo, Administrator General v. Tunwase,[4] the deceased woman was

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1. [1976] Suit No. M/481/76, unreported, Customary Court Grade B. No. 4, Mapo Ibadan, 23 Oct. 1976.
2. see Jung, op.cit.,pxxviii; Ruxton, op.cit., p.142 and see further, below, pp. 68-70.
3. See Anderson, Islamic Law in Africa, op.cit., pp.222-223: The Brooke Commissions were appointed in 1948 to investigate the position with regard to Native Courts in Nigeria and to make recommendations.
4. [1946] 18 N.L.R. 88; see also S.A. Adesanya, "Marriage According to the Local Islamic Rites of Southern Nigeria", Journal of Islamic and Comparative Law, Vol.2, 1968, pp.26-53; Anderson Islamic Law in Africa, op.cit., pp.222-224; Lloyd, Yoruba Land Law, op.cit., p.27.

an Ijebu (Yoruba), and a Moslem. There was evidence that she was married according to Moslem rites and had lived and died a Moslem. There had been no divorce, although the deceased and her husband had lived apart for forty-five years before her death. Brooke, J., declared that he could find no evidence either of practice or of one occasion in which an Ijebu who married according to Moslem rites, and died without issue and intestate, had his or her property distributed in accordance with Islamic law. The learned Judge said:

> "There has been nothing to satisfy me that any local Mohammedan law or custom should be applied. No such custom has been established with regard to converts to Mohammedanism in this particular area and it is well known that in cases brought before the court such local custom (as found among the adherents elsewhere in the Yoruba country but not in Ijebu land) differs fundamentally from principles usually observed in Islam: the law of the religion of any person is that law subject to any special custom recognized and adopted by co-religionists in that area and there is no evidence as to this".[1]

The Judge concluded that the law applicable was Ijebu native law and custom, since the deceased woman was a native of Ijebu and had lived there.

Similarly, the Report of the Native Courts, Western Provinces Commission of Enquiry, (1952), states:

> "There is no personal religious law in this country and strictly the customary law is that prevailing in the area of Jurisdiction of the Court. It has been accepted, however, that there is a personal law to the extent that where there is a conflict of law the custom to be followed is that applicable to the particular cause and the parties to it,.... there is no fixed set of rules observed by a Muslim community and decisions in the Courts have shown that among the Yoruba there may be adherents of the religion but the local customary law is observed".[2]

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1. Alayo v. Tunwase [1946] 18 N.L.R. 88.
2. Report of the Native Courts, Western Provinces, Commission of Enquiry, 1952, p.18. The Commission refused to recommend a Moslem Judiciary (Sharia) for Southern Nigeria. They also held that the Maliki Code of the North has never been in force in the South.

From the above evidence it may be said that Islamic law relating to marriage and family life does not generally apply to Yoruba Moslems in the Southern States.

The number of Moslems who are natives of the other Southern communities is insignificant and, like the Yorubas, most of them do not observe Islamic law in their personal relationships.[1]

3. Polygamy in Islamic Law

A. Polygamy in classical Islamic law

Prior to Islam, there was no legal limit to the number of wives an Arab could take. As already noted, in ancient Arabia, a man usually had several wives, and in addition a number of concubines. The marital relationship was characterised by frequency of divorce, loose unions and promiscuity, which sometimes made it difficult to draw a line between marriage and prostitution.[2] In order to remedy this unlimited licensed promiscuity, Muhammad is said to have limited the number of wives to a maximum of four. The Koranic injunction reads:

> "And if ye are apprehensive that ye shall not deal fairly with orphans, then, of other women who seem good in your eyes, marry but two, or three, or four: and if ye still fear that ye shall not act equitably, then one only; or the slave whom ye have acquired: this will make justice on your part easier."[3]

This is the only verse in the Koran which deals with the question of polygamy.[4] As seen, it occurs only in connection with the treatment of orphans, and the question may be asked whether polygamy is permitted except when the

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1. See Anderson, Islamic Law in Africa, op.cit., pp.222-224.
2. See Schacht, An Introduction to Islamic Law, op.cit., p.7. see also Jung, op.cit., pp.xxxi-xxxiv.
3. Rodwell, The Koran, Sura, IV., V.3; see also Schacht, An Introduction to Islamic Law, op.cit.,p. 162; a man who is already married to a free wife may not marry a woman who is a slave.
4. See Kurshid Ahmad, Studies in the Family Law of Islam, p.62.

protection of the rights of orphans is involved? Moslem jurists disagree as to the legality of polygamy in Islamic law.

Ameer Ali asserts:

> "There is great difference of opinion among the followers of Islam regarding the extent to which polygamy or, more properly speaking, polygyny is tolerated or allowed in the Islamic system. An influential and growing section holds that the conditions under which it was permitted are so difficult of compliance that they amount to a virtual prohibition and that the circumstances which rendered it permissible in primitive times having either passed away or not existing in modern times, the practice of polygamy is in contravention of the law".[1]

Similarly, Abdur Rahim observes:

> "The Muhammadan law undoubtedly contemplates monogamy as the ideal to be aimed at, but concedes to a man the right to have more than one wife, not exceeding four, at one and the same time, provided he is able to deal with them on a footing of equality and Justice".[2]

In the opinion of many jurists, the latter provision makes the practice of polygamy virtually impossible. Thus Syed says:

> "Now, let me state as emphatically as I can that polygamy is not a part of Islam; or to put it a little differently, it is as much a part of the Islamic system as any other disagreeable institution common in the West is a part of Christianity".[3]

He considers the Koranic injunction about polygamy mere toleration of an existing and extravagant custom, and says that the condition attached is so stringent that it virtually amounts to a prohibition, since the passage of the Koran does not signify mere equality of treatment in the matter of'lodgement and maintenance', as some of the archaic schools of law have construed, but also

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1. Ameer Ali, op.cit., p. 159.
2. Abdur Rahmin, op.cit.,pp. 327-328.
3. Ameer Ali (Syed) The Legal Position of Women in Islam (London, University of London Press, 1912), pp.25-26.

complete equality in love, affection and esteem, an impossible provision in practical terms.[1]

The views of the majority of Moslem jurists, however, are expressed in this sentiment of Jung's:

> "Monogamy may be an ideal, but polygamy remains a lawful institution recognized by the law all over the Muslim world, in Arabia, Egypt and other parts of Muslim Africa, in China, India and other countries inhabited by the Muslims".[2]

Most jurists, however, agree that polygamy is permissible, not mandatory. "It is not specifically forbidden, nor is it contrary to the essence of marriage that a man should have only one wife".

The reasons advanced by Moslem writers for the prohibition or restriction of polygamy by the Prophet Muhammad, who himself did not observe such restrictions,[3] was the desire to improve the position of women, of orphans, and of the weak in general, to restrict the laxity of sexual morals, and to strengthen the marriage tie.[4] These reasons seem strange when it is considered that, although the number of wives was limited, the number of concubines or "slave wives" was not. Muir notes that, "as regards female slaves with whom (irrespective of his four wives), a Moslem may, without antecedent ceremony or any guarantee of continuance, cohabit, there is no limit".[5]

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1. Ibid.,pp.28-29; In Itwari v. Asghari [1960] A.I.R., Allahabad, 684; Fyzee, Cases No.17, p.188; Dhavan, J., held that, in India, the Islamic institution of polygamy was "tolerated but not encouraged". He refused to grant a husband who had married a second wife a decree of restitution of conjugal rights against his first wife who refused to live with him,on the ground that under the social conditions of India today, the taking of a second wife must be regarded as an insult to the first wife, which was likely to cause her mental suffering and affect her health. See also Badruddin v. Aisha Begum [1957] All L.J. 300; and Shahulameedu v. Subaida Beevi [1970] K.L.T.4, where polygamy was described as "the rather unholy practice of a conjugal quadrangle".
2. Jung, op.cit., pp.xxxi-xxxiii. The M'utazalas are strict monogamists.
3. The Prophet is reported as having as many as nine wives at the same time, see Bello Daura, "The Limit of polygamy in Islam, 3 Journal of Islamic and Comparative Law, 1969, pp.21-26 at p.24; see also Ameer Ali, The Spirit of Islam, or The Life and Teachings of Mohammed (Calcutta: Lahiri and Co., 1902).
4. Schacht, Introduction to Islamic Law, op.cit.,p.13.

Footnote 5 continued.....

Some jurists even argue that these "slave wives" were legally married, since any offspring of such unions was legitimate.[1]

In addition, the Koran expressly provides that if a man "be desirous to exchange one wife for another," provided he gives the discarded wife the dowry he had given, or promised to give to her at the time of the marriage, he may do so.[2] It is difficult, therefore, to see how the marriage tie could be strengthened by the restriction of the legal wives to four, except among the very poor classes.

Among those jurists who claim that polygamy is legal in Islamic law, there is disagreement as to the validity of a fifth marriage, or further polygamous marriages where none of the first four marriages has been validly dissolved. Jung maintains that it is a "fundamental doctrine of Moslem law that a man cannot have more than four wives. If he desires to marry another woman then he must divorce one of the four".[3] He cites various authorities to show that a convert to Islam who had five or more wives in ancient Arabia, was obliged to divorce all, except four, and that according to Muhommad and Zafar, the man is at liberty to select any four out of the number of his wives, but according to Imam Abu Hanifa, Shafi, Malik and Hanbal, the first four marriages are valid, and the rest should be separated.[4] A fifth wife is therefore expressly prohibited to a man whose four

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Footnote 5 continued..... William Muir, The Life of Mahomet (From Original Sources, 3rd. edit. (London: Smith, Elder and Co. 1894), p.323; Anderson, Islamic Law in Africa, op.cit.,p.25.

1. Adesanya, "Marriage According to the Local Islamic Rites", op.cit., p. 31.
2. Rodwell, The Koran, op.cit., Sura IV, 24, at p.413.
3. Jung, op.cit.,p.23; Russel and Suhrawardy, op.cit., p.19, par. 55.
4. Jung, op.cit., p.24

legally married wives are alive at the relevant time.

> "If a man marries five women consecutively then the marriages of the first four are valid and the fifth one is void, but if a man marries five woman (sic) by one contract then all of them are invalid".[1]

Jung attributes the confusion surrounding the legality of the marriage of a fifth wife to an indiscriminate use of the words batil and fasid. Some jurists have used them synonymously. But in legal terms, batil signifies that no legal results follow, and that the transaction is void, ab initio, while fasid denotes an act which is not wholly devoid of legal consequences. In a batil marriage, there is no dower or idda, nor is parentage established, while in a fasid marriage, after cohabitation, idda and a customary dower become obligatory. If cohabitation has not taken place, then no legal results follow. In a batil marriage, whether cohabitation has taken place or not, there are no legal consequences.[2]

Jung argues convincingly that the marriage of a fifth wife during the iddat of a fourth wife is quite distinct from the marriage of a fifth wife during the life-time of the four legally married wives. Both marriages are not unlawful, but while the former is fasid, the latter is absolutely void, that is, batil. He criticises the erroneous conclusion of Ameer Ali who treats the contract of marriage with a fifth wife as fasid only, and says that such a view is not supported by any authority.[3]

In Aizunnisa Khatoon v. Karimunnisa Khatoon,[4]

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1. Jung, op.cit.,p.24, quoting Fatawa Kazi Khan; see also Ruxton, op.cit., p.99.

2. Jung, op.cit., pp.24-27; Fyzee, op.cit., p.112; Abdur Rahim, op.cit., p.330; Cf. Farran, op.cit., pp.52 and 138; he translates batil as irregular and fasid as meaning absolutely void.

3. Jung, p.26; see also S.A. Adesanya, "Marriage According to the Local Islamic Rites of Southern Nigeria", Journal of Islamic and Comparative Law, 1968, Vol.2, p.26, who, following Fyzee, argues that marriage to a fifth wife is only fasid; Cf. Bello Daura, "The Limit of Polygamy in Islam", Journal of Islamic and Comparative Law, Vol.3, pp.21-26, who argues to the contrary.

4. [1895] 1 A.23, Cal.130; see also Lawall v. Younan [1959] W.R.N.L.R. 155, where the Supreme Court of Nigeria,

footnote 4 continued.....

the Calcutta High Court observed that

> "the authorities are indeed agreed in saying that a marriage with a fifth wife during the iddat of the fourth after divorce is not void, but invalid only, but that is clearly intended to be an exception to the rule that a marriage with a fifth wife, while four other wives are in existence and none of them have been divorced, is absolutely void."[1]

B. Polygamy among Moslems in Northern Nigeria

Whatever may be the correct interpretation of the Koranic injunction in regard to polygamy, in Northern Nigeria, possession of many wives confers social prestige, and many Moslem men marry not only the four wives allegedly permitted by the Koran, but also many additional wives, who are, however, referred to as "concubines".

Before the abolition of domestic slavery in Nigeria, concubines were slaves. Three of the former wives of the late Shehu of Bornu were interviewed during field-work in Maidugari. They all described themselves as "concubines" or "servants" of the Shehu. They claimed that they were seized by order of the Shehu while they were children of about six to eight years old, and married to the Shehu as concubines. They grew up in his palace, and two of them had children for him. After his death, they were married off to other men. One of them married three husbands after the Shehu's death, but they all returned to the Shehu's palace after they were divorced by their husbands. They explained that this was due to the fact that they never knew who their natural parents were, and regarded the Shehu and his first legal wife (Gumsu) as their father and mother. They all preferred the Shehu as a husband than any of the other men they had married.

Footnote 4 continued..... expressed the opinion, obiter dicta, that only four of the nine wives of a "strict" deceased Moslem could be lawful wives, although the Court did not say which four. See also Lawall v. Younan [1961] 1 All N.L.R. 254 at 251.

1. See S.F. Nadel, Black Byzantium, 1942, 1965, p.151; Adesanya, op.cit., p. 34.

At the time of the interview they were living in an adjunct of the palace, and were being maintained by the Shehu's heir in office.

Although slavery has been officially abolished,[1] many Moslem men, especially the wealthy and influential ones, continue to marry more than four wives.[2] The additional wives are described as slave wives, but they are in fact not slaves,[3] or the descendants of slaves.

In one compound visited in Maidugari, the head of the household, an Upper Area Court Judge, had, in addition to his four legal wives, several other wives, described as "servants", nearly all of whom had borne children by him. These "servant wives" were not permitted to stand in the presence of the legal first wife. They had to assume a crouching position while she gave them her orders. One of these "servants" appeared extremely young: although she must have been about fifteen years old, since she already had a child, yet in appearance she seemed not more than twelve. The legal wives were in khul,[4] but the "servant wives" were not.

The level of polygamy among Northern Moslems is still very high, and there is no sign of a significant decrease in the near future, since it is the educated and wealthy men who set the standard in marrying several wives.

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1. See the Slavery Ordinance, 1916, (as amended in 1936) abolished the legal status of slavery in the whole of Nigeria. Slave Dealing Ordinance, No. 1 of 1874 Section 2 which applied to the Colony and Protectorate, declared dealing in slaves unlawful.

2. The Penal Code Law of the Northern States, S.384, provides that "Whoever having a husband or wife living marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine". If the view is taken that the marriage of a fifth wife by a Moslem man who already has four wives is void, a Moslem man who contracts such a fifth marriage may be punished under this section.

3. See Trimmingham, op.cit., p.168; Nadel, op.cit.,pp.151-154. J.N.D. Anderson, "The Eclipse of the Patriarchal Family in Contemporary Islamic Law," in Family Law in Asia and Africa, edit. J.N.D. Anderson, 1968, p.233- "women who occupy the legal position of slave concubines", are still found in Northern Nigeria.

4. For the meaning of khul, see below, p.59.

This is the reverse of the position in the South, where very few educated or wealthy men opt for simultaneous polygamy. A gross disparity in the relative ages of the spouses is also more noticeable in the Moslem areas of the Northern States than it is in the South. This is due to the fact that a Moslem father has the legal right to dictate the choice of spouse for his daughter, and Moslem women, being less educated than the women in the Southern States are less vocal about their rights, and more amenable to parental discipline. They accept with resignation that a good Moslem girl ought to marry the man chosen for her by her parents, and, as a result, there is a greater tendency for fathers to marry their young daughters to very old but wealthy men as second or additional wives.[1]

Isa Shani[2] notes that it is "extremely doubtful whether there is a woman in the North who is in favour of having a co-wife". However, many of the older wives of polygamous households interviewed in Maiduguri reported a preference for polygamy. This was more apparent among the wives who were in seclusion, as there was greater fraternity among co-wives. The majority of women interviewed preferred monogamous marriages, and a few educated younger women were forceful in their assertions that they would not tolerate a co-wife, regardless of the status or wealth of the husband. Many wives had quarrelled with and left their husbands when they had taken second wives.

Barkow views polygamy as a sort of social insurance against the desertion of a wife, since

> "a woman with thoughts of home must consider leaving her husband in the hands of a rival. And though some co-wives get along well and some even request their husbands to marry again in the hope of reducing their share of the household labor, rivalry among wives is more common".[3]

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1. For example, during the writer's stay in Maiduguri, a high ranking education officer about sixty years of age was married to a girl in her early teens. This is typical of the general pattern of marriage among members of the upper strata of society.

2. Ma'ajl Isa Shani, "Divine Revelation and Custom in the Islamic Law of Divorce", Journal of the Centre of Islamic Legal Studies, Vol.1, No. 1, pp. 38-49.

3. Jerome Barkow, "Hausa Women and Islam", op.cit., p.322.

He notes that the Hausa word for co-wife, kishiya, derived as it is from the term kishi, jealousy, tells much about the relationship among rival wives".[1]

Polygamy among poorer Moslems showed a different pattern to that practised by the upper echelon of the social ladder. Because of economic circumstances, many men cannot afford simultaneous polygamy, and their efforts to emulate the wealthier men, and to fulfil what they regard as a religious duty, are translated into frequent changes of wives. Many cases are recorded of men marrying two or more wives, when financially they are incapable of maintaining even one. A wife who is kept in relative luxury would be tolerant of the tantrums of a co-wife, but where she is deprived of basic essentials such as food and clothing, there is no incentive for her to remain in a polygynous household.

Disenchantment with marriage leads to promiscuity and marital instability. Nadel observes of Nupe society:

> "This classbound polygamy deeply affects the sex morality of the women and, indirectly, of the society at large. Respect for chastity and the sanctity of matrimonial ties dominates the traditional moral concepts of Nupe. But this double morality of a social system which legitimizes unrestricted sexual desire of the men in one privileged stratum, but would force similar desires in other strata into the realm of illegitimate and indictable action, is in danger of defeating itself. In Bida it has clearly provided a strong stimulus to extra marital sex relations in all classes".[2]

Immorality in the community results in frequent changes of spouses among the poorer men, especially in urban areas, and is evidenced by the number of marriages an average person contracts. It is difficult to find many women over forty years of age who have only been married once. The fifty-two women interviewed in Maiduguri during field-work reported a total of 152 marriages, which means

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1. See also Yeld, A Study of the Social position of Women, op.cit.,p.67.

2. Nadel, A Black Bzyantium, op.cit., p. 152.

that each woman on average married 2.6 times.

Data from Zaria suggest that on the average, Hausa women marry three or four times each.[1]

The average number of times individual men marry is nearly double this figure.[2] In 1969, Barkow found that twenty-three percent of the men in a small Hausa Moslem community were polygynous,[3] but a survey in Kano revealed that of all the married men in the survey area, 64.9 percent had one wife, 27.6 percent had two wives, 5.9 percent had three wives and 1.5 percent had four wives. The percentage of polygynous husbands was therefore 35 percent.[4]

Among the Kanuri, Cohen notes that one out of every two marriages is a polygynous one.[5]

More revealing are the figures recorded by Hardiman in a survey carried out in Maiduguri in August 1974, which showed that of 149 women married to men from more than six tribal groups, 91 of the women had no co-wife, 34 had one co-wife, 14 had two co-wives, and 10 had three co-wives; 38.9 percent of all the women interviewed were therefore in polygamous marriages. The two main tribal groups of the husbands of the women interviewed were the Kanuri (66) and the Hausa (32). Of the women married to Kanuri men, 40.9 percent of them lived in polygamous households, while only 28.1 percent of the Hausa shared their husbands.[6] These figures may be compared with the 11 women

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1. See M.G. Smith, The Hausa of Northern Nigeria, op.cit., p. 143. For Kano see Polly Hill, Population, Prosperity and Poverty: Rural Kano, 1900 and 1970 (London: Cambridge University Press, 1977), pp.113-115; see also M.G.Smith, Government in Zazzau, 1800-1950, op.cit., p.256.
2. See Table 9:1 and 9:2 below, pp. 93 and 94.
3. Barkow, "Hausa Women and Islam", op.cit., p.322; see also Hill, op.cit., pp.113-115.
4. See M.J. Mortimore and J. Wilson, Land and People in the Kano Close Settled Zone: A Survey of Some Aspects of Rural Economy in the Ungogo District, Kano Province, op.cit., p.39; See also Yeld, A Study of the Social Position of Women, op.cit., p. 98 who reports that in Kebbi Village of Felende, out of 183 marriages investigated in 1959, 142 men had only 1 wife, 37 men had 2 wives, 3 men had 3 wives and 1 man had 4 wives.
5. See Ronald Cohen, The Kanuri of Bornu; Case Studies in Cultural Anthropology, (New York: Holt, Rinehart and

footnotes 5 and 6 continued.....

interviewed who were married to Ibo/Yoruba husbands, none of whom had a co-wife.[1] As will be shown later in the section on divorce, Kanuri marriages are not only characterised by a high degree of polygamy, but an extremely high rate of divorce and remarriage among both sexes.

The argument that prostitution does not exist in a polygamous society has been fully explored in an earlier chapter,[2] but further evidence to rebut this proposition is available in the Northern Moslem societies. In spite of the high rate of polygamy there, prostitution is still rife. As Baba of Karo, an old Hausa woman notes:

> "Some prostitutes were the daughters of mallams, some were the daughters of noblemen, some were the daughters of commoners; if their parents had arranged marriages for them against their will they ran away and became prostitutes. Then and now, it's the same; there have always been prostitutes".[3]

Of the men who patronize these prostitutes she says :

> "The men were always coming, they had wives, they had their concubines, then they went out and had prostitutes too".[4]

This is not only typical of Hausa society where traditionally prostitution was ritualised in the Bori cult, but also of other Moslem communities in the North.[5]

Footnotes 5 and 6 continued.

5.... Winston, 1967), p.43; see also Ronald Cohen, Dominance and Defiance: A Study of Marital Instability in an Islamic African Society, (Washington: American Anthropological Association, 1971), pp.142-143.

6. These figures can also be compared to the rate of polygamy among the Southern communities in Nigeria, discussed above, see Chapter IV, pp. 339-347.

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1. See Margaret Hardiman, Women in Maiduguri,(Report of a Survey carried out on behalf of the Max Lock Group, Nigeria, 1974), Chapter 6, Part 7, p.11. Table 5.

2. See above, Chapter IV, pp. 332-333.

3. M.F. Smith, Baba of Karo: A Woman of the Muslim Hausa, op.cit.,p.63; see also M.G. Smith,"The Hausa of Northern Nigeria," in Peoples of Africa, edit. by James Gibbs, op. cit., p.143.

4. M.F. Smith, op.cit., p.64.

5. See e.g. Nadel, A Black Byzantium, op.cit., pp.152-155, for prostitution among the Nupe A survey of Maidugari carried out by the Social Welfare Department in 1970 estimated that there were about 7,000 prostitutes in

footnote 5 continued.....

It is true that a large number of the prostitutes found in the North are from the Southern States, but a Moslem woman who may be too ashamed to practise her trade among her own people may also migrate to other Northern States, or to Lagos, where she is assured of anonymity in the cosmopolitan population of the larger towns.

Illicit sexual relations are not confined to prostitution. Many cases of seduction of young unmarried girls are recorded in the Social Welfare Office in Maidugari. In some of these cases the seducers are well-placed older men who invariably are already married to several wives. Extra marital relations, even with a consenting adult unmarried woman, is absolutely forbidden by Islamic law, and (unlike the Criminal Code Act of the Southern States) is a criminal offence under the Penal Code Law, 1960,[1] of Northern Nigeria. In practice, however, evidence seems to indicate that the law is not vigorously enforced.

Footnote 5 continued..... Maiduguri at that time according to information extracted from the tax lists of Ward Heads. But the survey carried out by the Max Lock Group (Nigeria), in July-Sept., 1973, estimated that there were about 1,456 prostitutes in Maiduguri. Given an estimated female population of about 43,000 over fifteen years of age, this figure means that one in every six women was a prostitute.

It was suggested that the discrepancy in the two estimates may have been due to the fact that shortly before the second survey, prostitutes were rounded up and driven out of town, as their presence was connected with the drought afflicting the area. Although, probably, the majority quickly returned, this incident may have made them less willing to declare their occupation - see The Report on the Household Survey, 1973: The Domestic Group in Maiduguri, Part 7, Chapter 4, par. 203.

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1. Cap. 89, Laws of Northern Nigeria, 1963 Revision, ss. 387 and 388. Section 387 provides:
"Whoever, being a man subject to any native law or custom in which extra-marital sexual intercourse is recognised as a criminal offence, has sexual intercourse with a person who is not and whom he knows or has reason to believe is not his wife, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be punished with imprisonment for a term which may extend to two years or with fine or with both".

In Obeya v. Soluade and Solicitor General for Benue

footnote 1 continued.....

For example, in a complaint[1] brought to the Social Welfare Department, it was alleged that a seventeen years old girl had been seduced by a doctor, on the pretext that he would cure her of her illness. As a result of their association she became pregnant. The doctor persistently denied paternity, but was forced to admit that the child was his when blood tests revealed that he, the girl, and the child were all group N. He eventually signed an agreement to pay £3 per month for the maintenance of the child until such time as the boy was old enough to be taken care of by him. The girl married someone else, but was divorced after only eighteen months. In desperation, she again sought the help of the Social Officers. She reported that she was divorced because of her "disclaimed child", and that she wanted the doctor to take his child so that she could marry again without having to face the same problem she had with her first husband.

Another complaint[2] involved an employee of the Ministry of Works and Survey. A girl who went to him for help in finding a job was seduced by him, and as a result became pregnant. When she wrote him about her condition, he refused to answer her letters, but when approached by Social Welfare Officers, he admitted his relation with the girl.

In neither of these two cases, nor in any of the many others recorded, was any mention made of a criminal prosecution. The most the Social Welfare Officers did was to try to persuade the men involved to support the children begotten as a result of the illicit intercourse.

Many Moslem jurists adopt an apologetic attitude about polygamy in the Koran, and assert that it was only sanctioned in Islam, because, during the early days of Islam, the wars decimated the male population, leaving

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Footnote 1 continued.....Plateau State, [1970] Suit No. 125/69, unreported, 6 March, 1970, it was held that sections 387 and 388 of the Penal Code Law do not contravene the Nigerian Constitution.

1. Ref. No. SWO/F.C.W/10/7, Social Welfare Dept., Maiduguri.
2. Ref. No. SWO/F.C.W./9/5, Social Welfare Dept. Maiduguri.

women and orphans in need of care and protection. Abdur Rahim claims:

> "If we leave out of account that class of people who, owing to abnormal conditions of society, are not, generally speaking, influenced by the ideals of law and religion or by healthy public opinion, monogamy is certainly the general rule and not the exception among the Muhammadans while polygamy is regarded by them as a safeguard, however undesirable in itself against greater social evils".[1]

Similarly Ameer Ali states

> "In India hardly more than two percent of men have more than one wife; in Persia it is about the same, whilst in Turkey, polygamy is extremely rare".[2]

However true these observations may be for other Moslem communities, the position is different in Nigeria, where the level of polygamy is still relatively high and the number of wives a man has is a symbol of his prestige. Moslem men in the Northern States are monogamous by force of financial circumstances, and not by desire, and they justify the practice of polygamy by reference to the Koran.

Fafunwa reports that the Moslem Governor of Rabat was shocked when he heard that Nigerian Moslems are still quoting the Koran to support their practice of polygamy. The Governor was quoted as saying that he had no objections to Nigerian men having many wives but they should not quote the Koran to justify their personal desires and wishes. He also allegedly said that the practice of monogamy in Morocco is over a hundred years old, and that if a man does have two wives, he will be too ashamed to advertise it.[3]

Modern legislation in several Moslem societies in various parts of the world has set strict limits to, or

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1. Abdur Rahim, op.cit., pp.340-341.
2. Ameer Ali (Syed), The Legal Position of Women in Islam, p. 29.
3. See Fafunwa, "Islamic Concepts of Education with Particular Reference to Modern Nigeria", op.cit., p.19.

abolished, outright, the practice of polygamy.[1] There is no evidence of similar steps being taken in Northern Nigeria to reduce the practice of polygamy.

4. The status of women in relation to the formation of marriage

The status of women in relation to the formation of marriage is discussed under three main headings:

A. the nature and essentials of a valid marriage;
B. consents to marriage;
C. capacity to marry;
D. marriage consideration.

A. The nature and essentials of a valid marriage

Under classical Islamic law marriage (nikāh) is a contract and not a sacrament.[2] It is an institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchastity.[3] That it is a civil contract is manifested by the various ways and circumstances in and under which marriages are contracted or presumed to have been contracted. There are, however, some Moslem jurists who assert that the institution of marriage is not merely contractual and civil, but that it is a "secular contract partaking of the nature of ibadat (religious rite)",[4] and therefore that is is also

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1. For example, Turkey, Egypt, Morocco. See generally Norman Anderson, Law Reform in the Muslim World, (London: The Athlone Press, 1976); Levy, op.cit., p. 101-102.
2. See Joseph Schacht, An Introduction to Islamic Law, op.cit., p.161; Abdur Rahim, Principles of Muhammadan Jurisprudence, op.cit.,pp.328-329; Fyzee, op.cit.,p.90; Farran, op.cit.,pp.47-48. See also S.C. Sircar, Mahommedan Law, Tagore Law Lectures, 1873, Vol.1., p.74; and Abdul Kadir v. Salima [1866] 8 All 149, 154-155; Fyzee Cases, 103, 108.
3. Syed Ameer Ali, Mahommedan Law, 1929, Vol.2, p.269.
4. Jung, op.cit., pp.xviii and 40; G.H. Stern, Marriage in Early Islam,1939, pp.104-108; Abdur Rahim, op.cit., p.327. See also Annis Begam v. Muhammad Istafa [1933] 55 All 743, 756, Fyzee Cases, 18, 27.

a Sacrament.[1]

Whatever may be the true nature of marriage in Islamic law, it is generally agreed that the validity of the marriage does not depend on the observance of any religious rite or ceremony. The law does not prescribe any particular form in which the contractual performance should be effected. It does not provide that the agreement should be evidenced by any writing nor is the presence of witnesses essential for its validity in some schools of Islamic law.[2]

(11) Essentials of a valid marriage

The essentials of a valid Islamic marriage are:

(a) an offer, and an acceptance of that offer, made by the contracting parties or their recognized agents at the same meeting;

(b) the absence of any impediment to marriage between the parties - e.g. a Moslem woman cannot marry a non-Moslem man;

(c) the consent of the bride's guardian is usually necessary.[3]

The formality required by the law that the contract must be concluded in the presence of two or more witnesses is to ensure due publicity, and seems to be an evidential rather than an essential legal requirement. Maliki law does not insist upon the presence of witnesses to the contract, provided due publicity is given to the commencement of marriage life.[4] In those schools where the presence of witnesses is essential, there is a difference of opinion

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1. See Abdur Rahim, op.cit.,p.327; Jung, op.cit., p.xviii; Mariyama v. Ejo [1961] N.R.N.L.R. 81 cf. Vesey-Fitzgerald, op.cit.,p.36; "Although a religious duty, marriage is emphatically not a sacrament. There are no sacraments in Islam"; Abdur Kadir v. Salima [1886] 8 All.149 at 154-155; Fyzee Cases, p.103, 108.

2. See Ameer Ali, Mahomedan Law, op.cit.,Vol.2, p. 286; Coulson, op.cit., p.10. Witnesses are not necessary under Shi'i law.

3. Abdur Rahim, op.cit.,p.329; N.J. Coulson, Succession in the Muslim Family,op.cit.,pp.10-12; Russel and Suhrawardy, op.cit.,p.3; cf. Abdur Rahman, Institutes of Musulman Law (Calcutta: 1907), p.14.

4. Abdur Rahim, op.cit.,p.329; Coulson, Succession in the

footnote 4 continued.....

among jurists whether a marriage contracted without witnesses is void ab initio (bātil) or merely invalid (fāsid).[1] The witnesses required are two Moslem men, or one man and two women.[2] Women cannot be witnesses to a marriage in Maliki law.[3]

Among the Kanuri of Maidugari, two witnesses, who must be men, are always required, and in addition a Mallam[4] is invited to recite the surat-ul-fathia.[5]

It has been seen that marriage under customary law is essentially a contract between two families and not between two individuals as such. In spite of the fact that among Nigerian Moslems communities, all the marriage negotiations are conducted by the parties' parents, the stress in Islamic marriage is on the two individuals who are the actual parties to the marriage. A wife among the Moslems is never regarded as the "wife" of her husband's family, as a wife married under customary law in the Southern States usually is. Islam brings the nuclear family into greater prominence through its inculcation of duties to the actual father of a family. The Malikite system gives absolute authority to the husband as head of the family and as a result the extended family is undermined. Schacht notes that "Islam is opposed to tribal feeling because the solidarity of believers should supercede the solidarity of the tribe".[6]

Footnote 4 continued..... Muslim Family, op.cit., pp.10-11; in Shi'a law witnesses are not necessary.

1. See Ameer Ali, op.cit., Vol.2., pp.309-312.
2. Ibid., pp.309-312.
3. Ruxton, Maliki Law, op.cit.,p.90; Russel and Suhrawardy, op.cit., par. 58.
4. A Mallam is a Koranic scholar and teacher with knowledge of the Islamic texts. Imams and Alkalis (judges) are usually chosen from among the Mallams. In Nigeria today, the term is used in reference to any Moslem man of good social standing.
5. Verses from the Koran and other religious texts, especially the opening Chapter of the Koran.
6. Schacht, Introduction to Islamic Law, op.cit., p. 161.

Although an engagement is envisaged in Islamic law, a mere betrothal does not create any rights in Islamic law. An action for breach of promise of marriage is therefore not possible.[1] Unlike the marriage ceremony which should be celebrated in public, according to the Maliki school, the proposal of marriage should be made in private. Among the Moslems of Nigeria, however, the ceremony equivalent to an English engagement is a semi-religious one. Relatives of both parties, as well as friends, attend. The mallam will also be invited to say prayers and bless the proposed marriage. This ceremony is predominantly customary.

As a result of marriage in Islamic law being essentially a contract, the parties may make stipulations which add to or detract from their legal rights and duties, but any stipulation which is contrary to an express command of the Koran would not be enforced.[2]

B. Consents to Marriage

All schools of Islamic law recognize the institution of marriage guardianship under which the father or other close male relative of a woman has a measure of control over the marriage of his ward. The distinguishing feature of Islamic jurisprudence in this respect is that it empowers a father to impose the status of marriage on his minor children. This power of imposition is known as jabr, and the guardian so empowered is known as wali.[3] This rule is followed by all schools as far as a minor girl is

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1. If an engagement is broken, the ornaments, clothes and money given by the groom can be returned; see Faiz Badruddin Tyabji, Muslim Law, 4th. edit. (Bombay, 1969), pp. 105-106 par.90; William Macnaghten, Principles and Precedents of Moohummudan Law, (Calcutta, 1825),pp.250-252.

2. See N.J. Coulson, A History of Islamic Law, (Edinburgh: Edinburgh University Press, 1964), p.190; Ameer Ali, Mahommedan Law, op.cit.,pp.321-322; see also Wilson, Anglo-Muhammadan Law, 5th. edit., 1921, p.132, paras. 56-58.

3. See Ruxton, op.cit., pp.89-96; Ameer Ali, op.cit., 341-356; Abdur Rahim, op.cit.,pp.330-331; Coulson, Succession in the Muslim Family, op.cit., pp.11-12.

concerned, but there is a divergence of practice among the schools in relation to the powers of the guardian to contract a marriage on behalf of an adult woman.[1]

Hanafi law puts male and female basically on the same footing with respect to their legal capacity to conclude marriage contracts. "A woman who is adult and of sound mind, may be married by virtue of her own consent, although the contract may not have been made or acceded to by her guardians, and this, whether she be a virgin or saibbah".[2] Legal majority is associated with physical puberty, when it is presumed, (unless there is evidence to the contrary), that the person concerned has attained that degree of sound and mature judgment which enables him or her to manage his or her own affairs. The irrebuttable presumption is that a person attains majority at age fifteen, but the Hedaya lays down that the earliest period for a boy is twelve years, and for a girl nine years.[3]

According to the Hanifi school, therefore, a girl may be married without the consent of her guardian, at the age of nine, provided she can prove by appropriate evidence that she has attained physical puberty, or at age fifteen without any proof of physical puberty. Correspondingly, her guardian cannot force her to marry against her wishes once she is nine years of age and can prove physical puberty, or she has attained the age of fifteen years.[4]

The Maliki school, however, observes this rule with regard to males, but holds that a previously unmarried woman, regardless of age, cannot marry without the consent of her marriage guardian, and may be married without her consent if she is married by her father or his appointed executor.

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1. Ameer Ali, op.cit., pp.343-345.
2. Abdur Rahim, op.cit., pp.330-331.
3. Ameer Ali, op.cit., p. 235.
4. See Schacht, op.cit., pp. 117, 161-162.

> "A father may impose marriage: 1. On his daughter who is insane. 2. On his virgin daughter, even should she be emancipated and old, unless he proposes to marry her to an eunuch or a lunatic. 3. On his young daughter, who is no longer a virgin either owing to an accident or to illicit intercourse".[1]

A testamentary guardian has a similar power to give in marriage an orphan daughter in accordance with her father's wishes.[2] The power of giving his daughter in marriage is virtually absolute in Maliki law, provided she has not been previously married, or emancipated.

Throughout most of Northern Nigeria, in accordance with Maliki law, a father is entitled to conclude marriages on behalf of his minor sons, or his virgin daughters, up to any age, at his unilateral discretion.[3] This is consonant with the principles of customary law which obtain in most of the Nigerian societies as already noted in a previous chapter.[4] Members of the extended families may be consulted, and the mother of the boy or girl in practice has considerable powers of persuasion, but in law, the right of consent belongs to the father or his recognized deputy. Maternal relations are not generally regarded as matrimonial guardians, and only relations through males are recognized.[5]

Most Moslem parents give only a limited choice of spouse to their daughters.[6] The normal procedure adopted

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1. Ruxton, op.cit., p.92. There are certain exceptions to the rule. The Maliki School considers the right of jabr as belonging exclusively to the father of the person to be married. In the absence of the father the right passes to his appointed executor, or to the Kadi - see Ameer Ali, op.cit., p. 348. The Hanifi School allows the right to all natural guardians; the Shafei School to the father or the paternal grandfather only.
2. Ruxton, op.cit., pp.92-93; Coulson, Succession in the Muslim Family, op.cit., p.12.
3. See Muhammad Yahaya, op.cit., p.3., 5; Anderson, Islamic Law in Africa, op.cit., pp.204-206.
4. See above, Chapter V.
5. See Russel and Suhrawardy, op.cit.,pp.5-7.
6. See Trimmingham, Islam in West Africa, op.cit., pp.164-165. See also M.F. Smith, Baba of Karo, op.cit., p.267, who records that the only instances of suicide which were encountered despite continual enquiry among the Hausa were those of girls who were the victims of forced marriage.

is for the girl to receive several offers of marriage accompanied by suitable gifts. Of these suitors, the girl may be given a choice. If the father approves of her choice, all will be well, but if there is a difference in opinion, more often than not, he makes the choice, and she has no option of refusal. In some cases, she may not even be consulted. In order to cement a friendship, to repay a debt of gratitude, or simply to pay honour to someone, a girl may be given by her father in marriage as an unsolicited gift. The father himself gives the girl a dowry, foregoes the payment of bride-price usually paid by the bridegroom, and makes a valid contract of marriage between the man and his daughter in the name of the Prophet Muhammad. Such marriages, referred to as alms-marriage or sadaqa, are said to be peculiar to West Africa and not of Islamic origin.[1] The bridegroom is often a mallam, student, orphan or other person, too poor to afford to give a dower himself, but the category is not restricted in practice in the Northern States, and may even be utilised to get rid of an unruly daughter.

In a case recorded at the Social Welfare Office at Maidugari, a girl was given in such a marriage by her father, a lieutenant in the Nigerian army. Her husband, who already had two other wives, was forced to divorce her after a few months of marriage. Twice she used a heavy metal to hit him on the head, tore up his clothes and left him naked on the streets, and according to the evidence of the police, seemed to be under the influence of bad company and drugs. Although she may have been uncontrollable in her father's house, there is a suspicion that she was revolting against the marriage in the only way possible to her. She expressed intense dislike for the husband, and

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1. In Nigeria, it is practised among the Kanuri and Hausa who have introduced it among the Nupe and Yoruba, see Anderson, Islamic Law in Africa, op.cit., p.208; M.F. Smith, Baba of Karo, op.cit., pp.99-100, 151-154; R.E. Ellison, "Marriage and Child-birth among the Kanuri", 9 Africa, 1936, pp.526-527; Johnson, History of the Yorubas, op.cit., p.116-117; Ahmadu Suka, "Conflict of Islamic Law and Customary Law of Family Relations in Northern Nigeria", Journal of the Centre of Islamic Legal Studies, Vol. 1, No. 1, pp.13-14.

the police had to intervene on his behalf several times. She was only sixteen years old, and eight months pregnant when she reported to the Social Welfare Office that her husband had given her a letter of divorce, but provided no maintenance for her.

Judging by the frequency with which such marriages were recorded at the Welfare Office, they seem to be quite common, and generally to have a high degree of instability.

C. Capacity to marry

Every Moslem of sound mind who is not a minor, is competent to enter into a contract of marriage. Majority is attained at puberty. A person who is an infant in the eyes of the law is disqualified from entering into any legal transaction, and is consequently incompetent to contract a marriage. A marriage contracted by a minor, whether male or female, who has not arrived at the age of discretion, or who does not possess understanding, or who cannot comprehend the consequences of the act, is a mere nullity.[1]

The marriage of minors can, however, be contracted by their marriage guardians, even without their consent. Among some schools of Islamic law, such a marriage, although valid, can be repudiated. A person married during minority, has, on attaining majority, the right to terminate the marriage by exercising the option of puberty. This rule is applied to both men and women, but the right of repudiation does not exist in the case of a marriage contracted by a father or grandfather, on the presumption that they must have acted in the best interests of the minor. Under Maliki law a minor cannot repudiate a marriage contracted by the father or his appointed

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1. See Coulson, Succession in the Muslim Family, op.cit., p.11; Fyzee, op.cit., pp.93-96; Ameer Ali, op.cit., pp.273-276; Abdur Rahim, op.cit., pp.330-331.

executor.[1]

Islamic law permits child marriages, and indeed, the precedent is set by Muhammed himself who was betrothed to Ayesha when he was fifty years old, and "she but six or seven years of age". The marriage took place about three years after.[2] Child betrothal and marriage is a feature of most systems of indigenous customary law, and this accords with Islamic law. Consequently, conversion to Islam necessitated no change in law in this respect.

The Criminal Code Act, 1916,[3] which originally applied to Northern Nigeria, has no provision making it an offence to consummate a marriage if the bride is still a child, although it is a misdemeanour unlawfully to defile girls under the age of eleven and thirteen respectively.[4] It has been noted previously,[5] that section 361 of the Criminal Code Act may be utilized against a father or other guardian who, in exercise of his right under customary law, marries a woman of any age against her will, and this section was equally applicable to a Moslem father or his executor who exercised his power of marriage by compulsion (jabr), although such a power was unexceptionable under the Maliki principles of law.

The present Penal Code of Northern Nigeria[6] provides that a man commits rape who has sexual intercourse with a woman who is under fourteen years of age. Her consent is immaterial.[7] Sexual intercourse by a man with his own wife, however, is not rape, if she has attained

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1. See Coulson, Succession in the Muslim Family, op.cit., p.12; Ruxton, op.cit., p.92.
2. See Muir, The Life of Mahomet, op.cit.,p.110; Guillaume, Islam, op.cit., p.172; see also Farran, Matrimonial Laws of the Sudan,op.cit.,p.39; In some Islamic States the law is such that scholars dispute whether a child en ventre can effectively contract a marriage. Cf. the position in customary law, see above, Chapter V., p. 370.
3. Cap. 42, Laws of the Federation of Nigeria, 1958 Revision.
4. Ibid.,s.222 "Sixteen" for the original "thirteen" and "thirteen" for the original "eleven"has been substituted, but the substitution applied only to Lagos.
5. See above, Chapter III, pp.269-271.
6. Penal Code Law, 1960, Cap.89, Laws of Northern Nigeria, 1963 Revision.
7. Ibid.,s.282 (1).

puberty.[1] Physical puberty depends basically upon proof of sexual maturity established under the normal rules of evidence, rather than the attainment of a specific age. There is an irrebuttable presumption of Islamic law that a girl below the age of nine, and a boy below the age of twelve has not reached puberty.[2] The husband of a girl under nine years of age who has sexual intercourse with her, would, therefore, be guilty of rape. There is also an equally conclusive presumption that puberty is attained by both sexes at the completion of the fifteenth year. No man can therefore be guilty of rape if he has sexual intercourse with his wife when she has once attained the age of fifteen years.

The question may be asked whether it is not inconsistent to have a criminal offence under which sexual intercourse with a girl under fourteen years of age (whether or not she consented) is a crime, if a girl of nine could marry. As Lord Buckmaster asked in the House of Lords during the debate on the English Age of Marriage Bill, 1929, when pointing out a similar anomaly in the English Law: "Does it not seem to you a remarkable thing that what the girl is incapable of consenting to once she can consent to in perpetuity?"[3] The result, of course, is that men threatened with prosecution for unlawful intercourse with a girl under fourteen would stifle it by marrying her, as happened in the case of The State v. Audu.[4] Between these two ages, puberty may have to be medically proved, and in the case of a girl, is usually proved if she has commenced

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1. Ibid., s. 282 (2).
2. See Coulson, Succession in the Muslim Family, op.cit., p.11; Coulson, Conflicts and Tensions, op.cit., pp.25-26; see also Nawab Sadiq Ali Khan v. Jai Kishori [1928] 30 Bombay L.R. 1346, 1351, (P.C.) where the Privy Council decided that majority in the case of a girl is attained at the age of nine, according to Shiite Islamic law.
3. See Hansard, House of Lords, Vol. 72, col. 962.
4. [1973] 1 N.M.L.R. 105; For criticism of this case, see above Chapter V, pp. 400-401.

menstruation. Some girls begin to menstruate at ten, or eleven,[1] and consummation of marriage may be valid in these cases under the Penal Code Law, but there is evidence that serious physical injury may be done to such immature wives.[2]

There is a tradition of child-marriages among the Moslem communities of Northern Nigeria.[3] Many of the older women interviewed reported having been married at ages ranging from five to twelve years, and there is evidence that many of these marriages were actually consummated before puberty. Quite a few informants said that they first had connections with their husbands as soon as their breasts began to show, and this seems to be more frequent when the child-bride was actually living with the husband in his own home. The case of Mohammed v. Knott[4] has already been noted in this connection. Anderson was reportedly told by the Waziri of Sokoto that child marriage is very common among the upper classes, and sometimes takes place when the girl is as young as five, whereafter she is often brought up in her husband's house and the marriage is consummated as soon as he considers her able to bear it.

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1. During her teacher career in England from 1959-1966, the present writer witnessed English school-girls who began menstruating at the tender age of eleven, and in two cases at a little under ten years of age, although scientific evidence given to the Latey Committee showed that the age of puberty of girls in England had been going down by approximately four months in every decade since 1830, and is now just over thirteen years. Consequently, the Committee rejected the proposal that the minimum age for marriage be raised to 18 years - see Latey Committee Report of the Age of Marriage, 1967, Cmd. 3342, paras. 116-177.
2. See Katharine Mayo, Mother India, op.cit., pp.39-65, esp. pp.55-57, 60-63, for statistics.
3. See Anderson, Islamic Law in Africa, op.cit., pp.204-205.
4. [1968] 2 All E.R., 563 [1969] 1 Q.B.1.

Similarly, Majasan states:

> "Child marriage is the rule rather than the exception in Hausaland and girls are married away at the age of five or six for reasons which it is believed will make them better wives and good mothers. It prevents pre-marital relationships with other men. She is also more likely to accept her parent's choice at this time than later".[1]

The frequent marriage of minor girls on much the same terms in Bornu was confirmed by the Wali of Maidugari. A girl's ability to consummate the marriage "will be judged by her 'type condition and physical strength' but will often precede puberty".[2]

There are indications that forced marriages, and child marriages, both more prevalent among Northern Moslems than among the Southern groups, may decrease to some extent in the future. This is because educated fathers are keen on educating their own daughters, at least up to secondary school level, although many of the girls in secondary schools are already married.[3] A good standard of education usually secures a better husband, and a few parents post-pone marriage until after secondary school. Educated girls, on the other hand, insist on marrying men of their choice, or rather, they resist paternal efforts to marry them to men whom they do not wish to marry.

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1. J.A. Majasan, "Traditional System of Education in Nigeria". Nigeria Magazine, No. 119, 1976, pp.23-28, at p.24; but see David Lucas, "Women in the Nigeria Labour Force" in Population in African Development, edit. by Pierre Cantrelle, op.cit., Vol.1., p.482.

2. Anderson, Islamic Law in Africa, op.cit., p.205; see also Yeld, op.cit., p.85.

3. Information obtained in Maiduguri revealed that more than half of the girls in Class Three at the Government Secondary School for girls were already married. Many girls left before graduation to live with their husbands. See also M.F. Smith, Baba of Karo, op.cit., p. 268 where it is reported that "administrative pressure on the Hausa rulers and chiefs to secure the return to school of girls who run away from school to get married, placed the native officials in an unenviable position, since they only were aware of the issues at stake; the fact that the concept of an unmarried adult woman is one which does not exist in Hausa culture, and the importance of education for girls".

For the daughters of the less educated, and poorer men, however, the future seems bleak. There is less tendency for such girls to be educated. Efforts to get parents to send their daughters to school under the "Free Primary Universal Education Scheme" have not received much support in the Northern States, even though the incentives provided are greater, and opportunities for qualified women are almost limitless in these States at present.

Because of the practice of wife seclusion, the education of Northern Moslem women has always lagged behind that of her male counterpart, and also behind the education of women in the Southern States.[1] While the position has been considerably improved for the daughters of the wealthier and socially influential Moslems, the daughters of the majority of the poorer Moslems remain largely uneducated.

Unfortunately, educated men, while opting for higher education for their own daughters, use their privileged positions to entice poorer fathers to give them their minor uneducated daughters in marriage, as additional wives. Moslem marriages in the North are characterised by a wide disparity of age between husband and wife,[2] and this disparity in age, a direct result of forced marriages and child-marriage, is a potent factor contributing to the unstability of marriage at the present time.[3]

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1. For the educational imbalance between Moslem women in the Northern States and women of the Southern States generally see, above, Chapter I.

2. See Nadel, Black Byzantium, op.cit., pp.151-152; See the submission of Mallama Hassu Kaita in the paper she submitted to the National Curriculum Conference; see further above Chapter I,p.122,n.3; Ogunsola, op.cit., p.84; Mallam Aliyu Zaria, Education of Women and Girls in the Northern Provinces, op.cit., p.51 et. al.

3. Yeld reports that forced marriages are still frequent in the villages of Northern Nigeria according to her informants, although only two cases came to her notice in Argungu during a period of two years. See Yeld, A Study of the Social Position of Women, op.cit., p.86.

In the Southern States, especially among the Igbos, many illiterate or poorly educated wives are sent for further education by their husbands after marriage. This may be stipulated for in the marriage contract by the wife's parents, and often the dowry payable for the marriage is reduced as a result.[1] Moslem husbands, however, do not generally educate their wives in this manner after marriage, although a few of them are now beginning to do so, and five of the women interviewed at the University of Maidugari were sent there by their Moslem husbands.

The most effective weapon to erase child-marriages in the North is the education of women.

D. Marriage consideration

In order to constitute a valid marriage, Islamic law requires that there should always be a consideration, moving from the husband in favour of the wife, for her sole and exclusive use and benefit. This consideration is called mahr or sadak (Hausa sadaki).[1] If no dower, which may be a sum of money or other property, or even personal service,[2] is stipulated at the time of the marriage, the legal validity of the marriage is not affected, and the wife is nevertheless entitled to the dower customarily fixed for the females of her family, provided the marriage has been consummated, either in fact, or in law. Dower, says Bailee, "is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect of the contract, imposed by the law on the husband as a token of respect for its subject, the woman".[3] Coulson,

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1. See Jung, op.cit.,p.x; Ruxton, op.cit.,p.106-114.
2. Jung, op.cit.,p.x; but see Roland Wilson, Anglo Muhammadan Law, op.cit.,p.115, who asserts that personal services rendered by the prospective husband for the wife do not count as property for the purpose of sadak; see also Bailie, op.cit., p.91. Ameer Ali, op.cit., p.440, notes that such a marriage would be valid in Hanifi law, but the wife would be entitled to her customary dower, but see p. 441, Vesey-Fitzgerald op.cit., p.65.
3. Bailie, op.cit.,p.91; see also Abdur Rahim, op.cit., p. 334; see Levy, op.cit., p.95.

however, holds that the husband obtains the right of sexual union in consideration of the dower that he pays to the wife".[1]

Dower in Islamic law owes its origin to the pre-Islamic customary payments made by an intended husband to his future wife (sadak), and to the parents of the wife (mahr). The latter payment is identified with the payment of dowry in the majority of customary law systems. The Prophet, in order to ameliorate the position of women, combined the two payments, so that it became a settlement or provision for the wife.[2] Fyzee maintains that although mahr was originally analogious to sale-price, since the inception of Islam, it is hardly correct to regard it as the price of connubial intercourse, since Islam insisted on its payment to the wife as a provision for a rainy day, and socially a check on the capricious exercise by the husband of his unlimited power of divorce.[3]

In Saleh v. Odhams Press,[4] the plaintiff, a Moslem, claimed that he had been defamed by an article in the defendant's newspaper headed "Child Wife Bought for £800". The article described the plaintiff's marriage with a Moroccan girl in Casablanca, under the Islamic law of the Maliki school, in terms of a sale. The £800 apparently was arrived at by inclusion of the air fare from England to Morocco, and the amount of dower paid by the plaintiff in consideration of the marriage. The defendants pleaded justification, on the ground that the marriage was concluded by the uncle of the bride, and involved the payment of a sum of money. It was held that this was a gross misrepresentation of the nature of an Islamic marriage, and that the uncle, the marriage guardian, was in no sense acting as a vendor, since it was not he, but the bride

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1. Coulson, Conflicts and Tensions, op.cit., p.25.
2. Robertson Smith, Kinship, op.cit., p.93.
3. Fyzee, op.cit., p.133.
4. [1963] Times Law Report, 25 June, 1963.

herself, to whom the dower was paid. The uncle had in accordance with Maliki law, merely acted as her representative, and upon her wishes. The defendant was accordingly held liable in damages for libel.

Khalil, however, fully equates the payment of dower with a sale, for he says:

> "Dower is analogous to a sale price, that is, dower comprises the same fundamental conditions as those attached to a sale. When a woman marries, she sells a part of her person. In the market one buys merchandise, in marriage the husband buys the genitale orvum mulieris. As in any other bargain and sale, only useful and ritually clean objects may be given in dower".[1]

The payment of mahr is sanctioned by the Koran.

> "And give those with whom ye have cohabited their dowry. This is the law. But it shall be no crime in you to make agreements over and above the law. Verily, God is knowing, Wise.[2]

As stipulated by the Prophet Muhammad, mahr may be paid in money or any other property or services, except things which are haram, such as wine or pork. A pair of shoes in one case, and a handful of dates in another, was considered as a sufficient dower by the Prophet.[3] The minimum amount payable varies but according to Maliki law is fixed at a quarter of a dînar or three drachma.[4]

The rules governing the payment of mahr, or sadak, are numerous, precise and show interesting variations among the various schools, but the most that can be attempted here is to indicate the essential legal differences between the payment of sadak in Islamic law, and the payment of dowry in customary law, insofar as they affect the position of women. To crystallize these differences, comparison will be confined to the Maliki school of Islamic law and the

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1. See Ruxton, Maliki Law, op.cit., p.106; see also Seymour Vesey-Fitzgerald, Muhammadan Law According to its Various Schools, (London: Oxford University Press, 1931), p.62; Vesey-Fitzgerald, op.cit., pp.62-63; Dower is 'recompense for the burden of child-bearing and suckling and hizanat of children which weigh upon the woman,' quoting Zeys, Marriage, p.17.
2. Rodwell, The Koran, op.cit., Sura IV, verse 4., p.411.
3. See Jung, op.cit., p.29; Ronald K. Wilson, Digest of Anglo-Muhammadan Law, 5th. edit. (London: Thacker, Spink & Co., 1921), p.114-116;Vesey-Fitzgerald, op.cit., p.63.
4. Ruxton, op.cit.,p.106.

customary law of the Igbo (Onitsha). The differences may be briefly summarised as follows:

(i) The agreement for the payment of sadak is made between the husband and wife, although one or both parties may be represented by their marriage guardians. The agreement for payment of dowry in customary law is between the husband on the one hand, and the father or other guardian of the bride, on the other. The bride is not a party to the agreement. The important result of this difference is that, while both payments are legal debts due from the husband, payment of sadak may be enforced by the wife, whereas payment of dowry cannot.

(ii) A man may not stipulate in his contract of marriage that there should be no payment of sadak. Such a marriage, if contracted, is void.[1] Under customary law an agreement that there should be no dowry payable does not affect the validity of the marriage.

(iii) A marriage contracted without any agreement as to the payment of sadak is nevertheless valid in Islamic law; and the wife may demand the customary dower after consummation of the marriage.[2] A marriage contracted without any agreement as to the payment of dowry is invalid in customary law.

(iv) Sadak is paid to the father or other guardian of the bride, in favour of the bride, and is for her sole and exclusive use and benefit. As a result sadak must be composed of property which is of material advantage to the wife. In customary law, dowry is paid to the father or other legal guardian of the bride. It is not for the benefit of the bride,

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1. See Ruxton, op.cit., p.106; this is according to Maliki law, but see Jung, op.cit., p.30 "where no dower is fixed or it is stipulated that there should be no dower, nevertheless marriage is valid and the customary dower is obligatory".

2. See Ruxton, op.cit.,pp.108, 110. Customary dower is the expression of the local value attaching to the bride with reference to her religious worth, her beauty and the renown of her family, and varies according to the wealth of the country. The amount may also be determined by what the bride's sisters have already received as their dower - see Ruxton, op.cit., p.111.

and only a small portion is given to the bride. The dowry may not be of direct benefit to her e.g. payment of a brother's education may be stipulated as dowry.

(v) If the sadak is below the value of the legal minimum, that is less than one quarter of a dinar or three drachma, the marriage is null and void. Certain property, such as wine or pork, is also prohibited as sadak. There is no minimum dowry payable under customary law and no property is prohibited, provided it is mutually acceptable to both parties.

(vi) If a man says to another "Give me thy sister as a wife in return for a dower of one hundred drachma and I promise thee my sister or daughter as wife for one hundred drachma, such a proposal would mean a marriage of privation and is null and void"[1] in Islamic law, but such an arrangement would be perfectly valid in customary law.[2]

(vii) The husband may, at any time after marriage, increase the sadak agreed on at the time of the marriage. Likewise, the wife may remit the payment of sadak or part thereof, and may use it for the benefit of the husband at her absolute discretion.[3] Agreement for payment of dowry in customary marriage is made before the marriage, and may not be legally changed by the unilateral act of either party to the contract. Since the wife is not a party to the contract, any alteration by her of its terms, has no legal validity.

(viii) Payment of sadak may be prompt or deferred. On the death of the husband, or wife, any sadak remaining unpaid, is immediately payable, and ranks as an unsecured debt due to the wife from the husband, or his estate.[4] In customary law, on the other hand,

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1. Ruxton, op.cit., pp.109-110.
2. This type of marriage is reported among the Igbos, see Talbot, Peoples of Southern Nigeria, op.cit.,pp.426, 440; see further below, Chapter III, p.258. It existed among pre-Islamic Arabs but was forbidden by Muhammad; see Abdur Ramin, op.cit.,pp.8-9; Levy, op.cit.,p.105; R. Smith, op.cit.,p.112.
3. Ruxton, op.cit.,pp.112-114.
4. Abdur Rahim, op.cit., p.334.

on the death of the wife, the dowry may still be claimed by her relatives as a debt due to them, but on the death of the husband, any dowry already paid must be repaid by the father, or other legal guardian, if the wife remarries to a non-member of her husband's family.

(ix) If the marriage has been consummated, or if the wife has lived for one year in the husband's house, even though intercourse may not have taken place and the husband divorces the wife, sadak, if not already given by the husband becomes immediately payable to the wife.[1] In customary law, dowry must be repaid in the event of a divorce, regardless of who initiates the divorce.

(x) In Islamic law, the affiliation of children does not depend on the payment of sadak. Provided there is a valid legal marriage, all children born to the parties during the continuation of the marriage, and the appropriate period of iddat, legally belong to the husband.[2] In customary law, if the husband divorces the wife, provided the dowry has not been repaid, all children subsequently born to the wife, legally belong to the husband. If dowry is not repaid after the death of the husband, children begotten by the widow for a non-member of the deceased husband's family legally belong to the deceased husband. There is no limitation of time.[3]

(xi) If payment of sadak is not completed, and no agreement for deferment has been made, the wife may refuse the husband access to herself, and she has no duty to return any amount he has already paid.[4] A customary

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1. See Ruxton, op.cit.,p. 108.
2. See below, pp. 73-76.
3. See above, Chapter VII, pp.593-607.
4. See Bailee, op.cit.,p.126; Ameer Ali, op.cit.,p.456-461. Jung, op.cit.,pp.34-37; Ruxton, op.cit.,p.108; see also Wilayat Husain v. Allah Rakhi [1880] I.L. 2 All.831; Nasarat Husain v. Hamidan [1882] 4 All.205; Nur-ud-Din Ahmad v. Masuda Khanam [1957]P.L.D.Dacca 242; the right of refusal is lost on consummation - see Wilson,

footnote 4 continued.....

> law wife may not refuse to consummate a marriage on the ground that all the dowry has not been paid, provided an agreement for payment has been made.

The above comparison reveals the essential nature of sadak in pure Islamic law as a settlement or provision specially made for the benefit of the wife. Although the minimum payable is so low as to negative this, it must be remembered that the provisions apply to all strata of society, and if placed at a higher minimum may make the marriage of certain classes of men difficult, if not impossible, to attain. There is no legal maximum, and if the amount is placed sufficiently high it may act as an effective deterrent to arbitrary divorce by the husband,[1] since a "husband thinks twice before divorcing a wife when he knows that upon divorce the whole of the dower would be payable immediately".[2]

The practice in regard to marriage payments in the Northern States of Nigeria shows an amalgam of Islamic law and indigenous customary law. The resulting admixture may vary in details among the various ethnic groups and sub-groups, but it is doubtful whether any Moslem community in Nigeria observes the strict Islamic provisions in regard to marriage payments.

In most communities, in addition to the sadak given for the exclusive use of the bride, the customary dowry payable to the father, and other payments under traditional customary law, are also paid.[3] For example, Anderson notes that in Zaria:

> "local custom prescribes seven different payments by the groom - some to the girl herself, some to her guardian, and some for distribution to members of her family - including the 'sadaki' which is handed to the guardian but is intended, nominally at least,

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Footnote 4 continued.....op.cit., par. 48; and Anis Begum v. Muhammad Istafa Wali Khan [1933] 55 All.743; Cases 18, criticising certain dicta in the leading Indian case of Abdul Kadir v. Salima [1886] 8 All. 149; Fyzee Cases, 103.

1. See Abdur Rahim, op.cit.,pp.333-334.
2. Fyzee, op.cit., p.133.
3. Nadel, Black Byzantium, op.cit.,pp.339-340; Trimmingham, Islam in West Africa, op.cit., pp.167-168.

> for the bride herself; while all those relatives who have received a share in these payments will contribute towards her tajhīz".[a wife's trousseau][1]

Among the Kanuri of Maidugari, three main payments are usually made. First, kokoram, the money included in the gifts (kare-ra'aki-be) presented by the boy's family, when they first approach the family of the girl to ask for her hand in marriage. These gifts, beside money, may include cosmetics, clothes and small items of jewellery, the value of which depends on the wealth of the groom's family. A popular girl may receive ten or more such gifts from various suitors, and if a boy's suit is not finally accepted, these gifts are refundable. The second main payment is luwaliram, money given at the ceremony when the date of the marriage is fixed. It is given to the marriage guardian of the bride luwali, usually her father, by the parents of the bridegroom. Finally, sadaga (Moslem-sadaki),[2] given by the bridegroom and his parents, to the parents of the girl. The sum of money may be "seventy-five kobo to millions of naira, according to the wealth of the bridegroom, his family and his friends. In addition to money, other property like clothes, jewels etc., may also be given".[3] Whatever is given, however, belongs exclusively to the girl, and she can do as she likes with it. There is nothing preventing her from sharing it with her family.

On the day of the marriage, the girl's parents present the bridegroom with gifts often equal to or surpassing those given to the bride by the groom and his family. These may consist of money, several changes of clothes, shoes, and traditionally a horse, which today may be replaced by wealthy parents of the gift of a car. In addition, when the girl is taken to her husband's home,

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1. See Anderson, Islamic Law in Africa, op.cit.,p.207.
2. The Daura Local Authority (Declaration of Daura Native Marriage Law and Custom) Order, 1972, provides that "dowry" means sadaki as laid down by Moslem law" - see N.C.S.L.A.N. 7 of 1972, Schedule, par. 1.
3. Information relating to Kanuri wedding was given by Kachalla Bura, 67 years old Kanuri employee of the Arts Council Maidugari, in a recorded interview held on Friday the 2nd and Monday, 3rd December, 1977, at the

footnote 3 continued.....

her parents send with her provisions, like millet, rice and meat which could last the married couple for a year or more.

As a result of the retention of customary law payments in relation to marriage by Moslem communities in the North, the position is not very different to what obtains in modern non-Moslem communities in the Southern States. The cost of marriage is prohibitively high, and many young Moslem men cannot afford to marry because of the exhorbitant marriage expenses. Moslem parents are prepared to give their daughters to the highest bidder, and the meagre amounts envisaged by the Prophet Muhammad, are never followed in practice, even among the very poor. Although the actual dowry paid may not be as high as among the Igbo for instance, the marriage gifts and other property demanded by custom for both bride and bridegroom may be very costly.[1]

Efforts to peg marriage expenses by local authority legislation, have not been more successful in the Moslem areas than they have been in the South. It is worth noting that the Daura local authority, while specifying the maximum amounts which may be expended on the customary gifts, and the marriage property given by the husband to his bride on the occasion of a marriage, does not restrict the amount of dowry (sadaki) payable. The Law provides:

> "In the case of a woman on her first marriage the bridegroom or his family shall provide the woman with the property set out in the First Schedule and in the case of [the] second or subsequent marriage the bridegroom or his family shall provide the bride with the property set out in the Second Schedule.[2]

Footnote 3 continued.....Arts Council, Maiduguri: Thanks are hereby recorded to him, also to Alhaji Abatcha, who contributed to the information; and to Mallam Kellu, Secretary to the Arts Council, who translated the information during the process of the recording.

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1. Provision of jihaz (wife's trousseau) by a father is not essential for a marriage under Islamic law, although it is customary among most Moslems. In Algeria, the bride's father is not bound to provide her with jihaz and if he does provide one, he may recoup his expenses out of his daughter's sadak; cf.the position in India, see Ameer

footnotes 1 and 2 continued.....

> In the case of any first or subsequent marriage the dowry shall consist of such property as may be agreed by the parties to the marriage or their respective families".[1]

Failure to specify a maximum sadaki payable demonstrates the reluctance of Northern Moslem authorities to introduce reforms which may be construed as contrary to divine law, even though the social circumstances may justify such reforms.

5. The Status of Women During Marriage

A. Purdah (kulle)

Purdah, or wife seclusion, also known as kulle among the Hausa, involves physical seclusion of Moslem wives in their homes. Although purdah has been a Moslem institution for about a thousand years,[2] some writers insist that wife-seclusion or veiling of women is not compulsory since neither the Koran nor the legal text-books have unequivocally ordered women to stay in seclusion, and that the verses in the Koran which enjoin it were addressed to the Prophet and his wives.[3] The relevant verses read:[4]

> "O wives of the Prophet! ye are not as other women. If ye fear God, be not too complaisant of speech, lest the man of unhealthy heart should lust after you, but speak with discreet speech.

Footnotes 1 and 2 continued.....

1. Ali, op.cit., p. 469.
2. The Daura Local Authority (Declaration of Daura Native Marriage Law and Custom Order, 1972, N.C.S.L.A.N. 7 of 1972, s. 6.

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1. Ibid., s.7.
2. See Mazhar Ul Haq Khan, Purdah and Polygamy: A Study in the Social Pathology of the Muslim Society, (Pakistan, 1972), p.17.
3. See e.g. Haroun Adamu, The North and Nigerian Unity: Some Reflections on the Political, Social and Educational Problems of Northern Nigeria, (Zaria, Nigeria: Gaskiya Corporation, 1973), pp.3-4; Muhammad Yahaya, "The Legal Status of Muslim Women", op.cit., p.23.
4. Rodwell, The Koran, op.cit., Sura 33, V. 32-33.

> And abide still in your houses, and go not in public decked as in the days of your former ignorance,...."
>
> Oh Prophet! speak to thy wives and thy daughters, and to the wives of the Faithful, that they let their veils fall low".
>
> Thus will they more easily be known, and they will not be affronted".

Adamu argues convincingly that the interpretation of the phrase "And abide still in your houses", to mean physical seclusion, is untenable, and he concludes that the phrase was no more than a code of behaviour for the wives of the Prophet, to be emulated by other Muslim women, and does not justify the physical seclusion of women such as is practised today in most parts of Northern Nigeria.[1]

With regard to purdah, the traditional legal textbooks say, "the husband has the right to stop his wife from going out of the marital home, no matter how vital that may be to her, even if she wants to pay a visit to her parents regardless of their state of health, or she wants to attend the funeral of one of them".[2] This is no more than the right of ihtibas (the control of a husband over his wife), which the Sharia has given to the husband in marital affairs because, generally speaking, he is mentally and physically superior to his wife.[3]

In Nigeria, the degree of seclusion actually practised varies, and may be so strictly observed that the wife is secluded from any man who is not within the prohibited degrees of marriage with her. This necessarily means absolute confinement within the boundaries of her home, and

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1. Adamu, The North and Nigerian Unity, op.cit., pp.4-6.
2. See Levy, op.cit., p.126-131, who notes that "the exceptions that can be enumerated to the general practice of the veiling and seclusion of women are comparatively few", see also, Tyabji, 2nd. edit. 1921, op.cit., pp.107-108; Wilson, Digest, 5th. edit., 1921, p.56; Muhaammad Yahaya, op.cit., p.23., See Muhammad Yahaya, op.cit., p.24, citing Al-Mughni, Vol. 7, p.20.
3. See Ameer Ali, The Legal Status of Muslim Women, op.cit., p.31, who asserts that sitting behind a screen is a mark of honour, a privilege, jealousy regarded as such by the ladies themselves.

inability to do ordinary things like shopping, going to the library, or cinema, conducting business, except by means of an agent, or household chores like fetching water or gathering firewood. Many of the activities which would elsewhere be done by the wife, have to be executed by the husband himself, or by servants, if he can afford to employ them. In practical terms, therefore, wife-seclusion is an expensive institution which is found only among the privileged classes, and mainly in the urban areas. Cohen notes that

> "In a society where male dominance is such a strong value and where purdah or wife seclusion is considered a primary indicator of such a value, there is a culturally accepted relationship between a man's social rank and the degree of purdah. In other words, one way of looking at purdah is to see it as a status enhancing practice for the husband".[1]

In theory, wife-seclusion is regarded as an enviable attainment for every Moslem male.

Among Moslem women there is a division of opinion as to the merits of seclusion. Women actually in purdah who were visited during field-work in Maiduguri, expressed complete satisfaction with the system. They feel sincere pity for less fortunate women who have "to go about and work like slaves" because their husbands cannot afford to keep them in seclusion. Muhammad Yahaya gives some of the reasons for their satisfaction. He says:

> "Any woman in the Northern States who experiences the life of purdah will hesitate to leave it because she is the queen in the harem. Her husband and his servants are her subjects. The husband must do all that she requires including visits to her relatives. Seclusion is a mark of honour and privilege to a lady".[2]

This description conjures up an exciting picture of the harems of the rich oil sheiks of Arabia, so well

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1. Cohen, Dominance and Defiance, op.cit., p.138; see also Report of the Commission Appointed to Enquire into the Fears of Minorities, op.cit., p.59.

2. Muhammad Yahaya, "The Legal Status of Muslim Women", op.cit., p.25

known in popular literature, but it is far removed from the stark reality of the actual condition of women in seclusion in Northern Nigeria, except perhaps for the very few really wealthy men.[1]

If women in purdah in Nigeria are satisfied to remain secluded, or entertain pity for those women who are not secluded, it is not because of the luxury of their existence, but because, never having experienced freedom or the satisfaction derived from direct contribution to the economy of the country, the idea that any woman could reject seclusion is unintelligible to them. They consider themselves as the favoured creatures of Allah; yet the futility of their existence and the resultant loss to national productivity are easily apparent to secondary school children in both Northern and Southern States. Many of these children, when asked to write essays[2] on "The Position of Nigerian Women", expressed the opinion that, had Nigeria educated and trained women, instead of keeping them in purdah and ignorance, the present pressing need for foreign skills would have been considerably less.[3] This point, although coming from the 'mouths of babes and sucklings' is worthy of note by the rulers of Northern Nigeria.

Among the younger, educated Northern Moslem women, there is evidence of considerable resistance to the system of wife-seclusion, summed up in the attitude of a young university graduate, wife of a Kanuri top civil servant in Maiduguri, who says:

> "I would not consent to remain in seclusion, even if I were given a million naira, or all the gold in Arabia".

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1. See Elizabeth Cooper, The Harim and the Purdah,(London: 1915), esp. pp.166-167; for an interesting account of life in purdah in India; the Indian system is very similar to purdah practice in Nigeria.
2. These essays were given during field-work for this thesis, in an attempt to get the opinions of the younger generation of Nigerians as to the status of Nigerian women. See further, Chapter I, p. 68.
3. See P.C. Lloyd, Power and Independence: Urban Africans Perception of Social Inequality, (London: Routledge and Kegan Paul, 1974), p.84.

Kanuri women especially, demand a high degree of freedom, and refusal of the husband to allow this, seems to be the greatest single cause of marital discord in Maiduguri. In cases of marital disputes brought to the Social Welfare Office in Maiduguri, the most frequent complaint of the husbands, was their inability to control the movement of their wives by preventing them from going out without express permission; and of the wives, the refusal of their husbands to allow them to visit even their parents and other close relations.[1]

The middle-aged night guard of the compound where the present writer was accommodated in Maiduguri was married to a wife in her early twenties. During the six weeks spent there, the couple had no less than five major fights, one of which ended in injuries to the husband, and two in the wife "packing" out of the matrimonial home. Each quarrel was the result of an attempt by the husband to keep the wife in seclusion. It was evident that she was extremely lonely during the day when the husband either slept or went to visit his friends. Because of communication difficulties (she spoke no English), she could not converse with her husband's employer, the only other female on the premises, and she was forbidden to speak to the young male cook employed in the house. The situation was not made easier by the fact that the husband's meagre salary was unable to give her the things she craved to compensate for such seclusion. The most violent quarrels coincided with pay day. This is an extreme case but seclusion can be a lonely life, and many Kanuri wives resent it, although husbands insist on it.

In one case where a young wife went to visit her parents without the permission of her husband who was then absent from home, she was divorced instantly by her mother-in-law, and his mother's action was endorsed by the husband

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1. In strict Maliki law, the wife could visit, or be visited by, her near relations, the male members of whom she is prohibited from marrying; the husband has no legal right to prevent these visits provided the wife's virtue is free from all suspicion. See Ruxton, op.cit., p.148.

on his return. The wife was six months pregnant, and probably homesick for her own mother.

Botting, commenting on the freedom of women in Bornu writes:

> "The position of women in Bornu society is much freer than in most Muslim countries, for the veil is unknown and seclusion in the house of parent or husband is much rarer. Women may dance in public with men, walk freely around the streets and talk openly with anyone they choose, and they play an active and significant part in ordinary day to day business especially on Market day. Women in Bornu are not usually regarded as either chattels, slaves or beasts of burden, and the Kanuri's prime occupation of agriculture is shared by both men and women".[1]

Similarly, Schultze, in a very early account of the population of Bornu says:

> "The ordinances of the Koran are very laxly observed, as is shown openly by the very slightly secluded life of the extremely coquettish Kanuri lady, who is thus enabled to play a definite part in public life, and who even apart from this shows none of the reserve of her sisters in strict Mohammedan countries. This freedom goes so far that, at least in the larger towns, the women show themselves in the streets and exhibit an exceedingly wanton demeanour, to which even the ladies of royal blood form no exception".[2]

Ma'aji Isa Shani writes in similar vein, but it is evident that he is echoing the sentiments of Botting, for he says:

> "The position of women in Bornu society is much freer than in most Muslim countries. The veil is known but the seclusion of women in the house of their parents or husbands is much rarer. Women may dance in public with men, walk freely around the streets and talk freely with anyone they choose".[3]

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1. Douglas Botting, The Knights of Bornu, 1961, p.55.
2. A Schultze, The Sultanate of Bornu, Translated from the German by P. Askell Benton, 1913, pp. 171-172.
3. Ma'aji Isa Shani, "Divine Revelation And Custom in the Islamic Law of Divorce", Journal of the Centre of Islamic Legal Studies, Vol. 1, No. 1, 38.

However, true these statements may have been of early Bornu society, or of Kanuri women in the rural areas of Bornu State, it is not true of Kanuri women in present day Maiduguri. The first feature of social life that strikes a visitor to Maiduguri today, is the relatively small number of women to be seen on the streets during the day.[1] It is a fact that seclusion is practised more extensively in the urban areas. Cohen notes that "urban marriages require no agricultural work and the wife is in much greater seclusion than her rural counterpart". In his sample he found a high incidence of seclusion in the city. In fact "all urban marriages were reported as kulle and all rural unions as non-kulle".[2] Of the 52 Kanuri women interviewed by the present writer in Maiduguri, only four were not in seclusion, and all four were highly educated women. It is difficult to find Kanuri women on the streets during the day, except very young girls below the age of eleven, and old women. Most of the traders and business people are men, and the few women who do engage in such activities are generally non-Kanuri. After prolonged search and investigation, one Kanuri woman was found, who sold small items of local cosmetics, but she admitted that she could only do this trade when her husband goes to the Sudan, but when he is present in Maiduguri she has to stay indoors. Although there are allegedly many prostitutes in Maiduguri, they seem to ply their trade unostentatiously and at night. Even during salah time, the public presence of women was not observed.

It is relevant to note Hill's description of seclusion in rural Kano (predominantly a Hausa town), in 1972. She observes:

> "Little pre-nubile girls of nine and ten were being thrust into full purdah (kulle-lit. locked) never to be allowed outside their husband's compounds

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1. The contrast Maiduguri presented with the busy market towns of Onitsha and Ibadan, the two other major research areas, with their preponderance of women traders, was particularly interesting. One felt transported to a different world.

2. Cohen, Dominance and Defiance, op.cit.

> during the day except (with permission) on special occasions or, at planned intervals, to visit their parental home. Older wives, too, usually remained secluded, to the point that any sixty-year-old seen walking towards Kano city was almost certain to be husbandless".[1]

Yet Robinson, speaking of Hausa women in Kano in 1896, says:

> "Women occupy a much more favoured position in Hausaland than in an ordinary Mohammedan country. With the exception of the wives of the king and one or two of his chief ministers, they are not kept in seclusion, but are allowed to go about as they please".[2]

This contradiction seems to indicate that, in all areas of the North, more wives are being secluded today, than they were at the turn of the century. In fact, Hill notes that until quite recently in Kano, only the wives of the more notable mallams were in strict purdah.[3] This increase in the purdah system may be due to better provision of basic facilities, for example, running water in the compounds. Increased individual wealth, a direct result of greater national prosperity, may also have contributed as seclusion of wives is a status symbol and an indicator of wealth.

In addition, as Cohen observes, all men wish to have their wives in the compound as much as possible, and are prepared to make physical and financial sacrifices in order to prevent their wives from gaining economic independence, since in their view, a loss of economic dependence may lead to a loss of their control and

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1. Polly Hill, Population, Prosperity and Poverty, op.cit., p. 84.

2. Charles Henry Robinson, Hausaland or Fifteen Hundred Miles Through the Central Soudan, (London: Sampson Low Marston and Co., 1896), pp. 205-206.

3. Hill, Population, Prosperity and Poverty, op.cit., p.84; see also Anderson, Islamic Law, op.cit., p.209.

dominance in the marital relationship.[1]

The proponents of the seclusion of women in Northern Nigeria justify the system on the ground that it is necessary to protect women, who are by nature morally weak. Implicit in this contention is the argument that men are by nature strong. If this is so, then there is no need to restrain the women, for the strength of the men will ensure the morality of women.

The fact is that men's sexual aggressiveness and moral frailty are recognized, and this, coupled with men's distrust and jealousy of each other, predicates the seclusion of women.

Sexual morality or virtue which can only be maintained by women being shut up is illusory, and is seldom attained in actual fact. It is false to think that because women are secluded, they are virtuous. In spite of seclusion, or probably because of it, divorce rates are remarkably high.[2]

B. Conjugal rights and duties

(1) Introduction

In common with other systems of law, marriage under Islamic law confers important rights and imposes duties on each of the parties to the marriage. According to strict Islamic law, the husband has absolute authority over the person of his wife. Such decisions as the choice of the matrimonial home, the degree of wife-seclusion, and the standard and mode of life, are entirely his to make, subject

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1. Cohen, Dominance and Defiance, op.cit.,p.75; see also Ursula M. Sharma, "Women and Their Affines: The Veil as a Symbol of Separation, Man. Vol.13, June 1978, pp.218-233 at p.229.

2. See Hill, op.cit.,p.84; see M.F. Smith, Baba of Kano, op.cit., p.64, where Baba, the old Hausa woman, relates the deception of Hausa wives in purdah; these wives indulge in illicit sexual affairs in spite of seclusion.

to any especial stipulations which the parties might have entered into at the time of the marriage or afterwards. On Islamic law marriage as under any other contract, the parties are free to some extent to curtail or extend the rights and duties granted to them under the law.[1]

The general principle of Islamic law, is that the wife is bound to reside with the husband, unless there are valid reasons to justify her refusal to do so. Abdur Rahim notes that:

> "The husband has the right to insist that the wife should live in his house and afford him access, abstain from due familiarity with strangers, obey him in all reasonable matters and be faithful to him. He can control her freedom of movement within certain limits and correct her for unseemly behaviour".[2]

Although the law allows the husband the right to beat his wife if he believes that violence will be an effective means of enforcing the desired behaviour, the "blows are to cause no fracture, wound or serious bruise".[3] In the Indian case of Moonshee Buzloor Ruheem v. Shumsoon-Nissa Begum,[4] the Judicial Committee observed that "The Muhammadan law on a question of what is legal cruelty between man and wife would probably not differ materially from our own". If the husband treats her with unmerited cruelty or in such a manner as to endanger her personal safety, she is not bound to live with him.[5]

(11) Maintenance

The Moslem wife is entitled to be provided with proper accommodation, at least a separate room, suitable

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1. See Abdur Rahim, op.cit.,p.333; Schacht, op.cit., pp.167-168.
2. Abdur Rahim, op.cit., p.333.
3. Ruxton, op.cit., p.119.
4. [1867] 11 M.I.A. 551.
5. See Ameer Ali, op.cit., pp.423-424.

to her position in life, and that of her husband. She is also entitled to clothing and food provided by her husband, although she may be financially able to maintain herself, and he is not.[1]

The standard of maintenance, according to Maliki law, must be on "a scale commensurate with the social position of the parties and in accordance with the customs of the country".[2]

If the household is a polygynous one, each wife has the right to be treated with equality. Each wife, whether Moslem, or Christian, has equal claims on the husband's time,[3] and he shall "under all circumstances spend an equal number of nights with each of his wives, but he need not, however, have an equal amount of sexual intercourse with each but may follow his own desires".[4] Equality of treatment poses a problem for a man who marries wives from two different stratas of society. For example, if one wife is the daughter of an Emir, her social status demands the provision of servants and other luxuries. If these luxuries are given also to the other wife, the daughter of a poor peasant, this may amount to unequal treatment in law, since the Emir's daughter is being treated according to her social status, while the peasant wife is being treated above her social status. On the other hand, if he treats them differently, and according to their social status, he would not be treating them equally in actual fact.

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1. Schacht, op.cit., p.167; Ameer Ali, op.cit., pp.404-422 esp. p. 408. No maintenance is usually due if the wife is too young for intercourse; see Jung, op.cit., p.41., or in a void (batil) marriage.
2. Ruxton, op.cit.,p.147; Jung, op.cit., p.41; Abdur Rahim, op.cit., p.334.
3. A newly married virgin wife is entitled to seven consecutive nights of her husband's time, or three nights if she is not a virgin, see Ruxton, op.cit.,p.119.
4. Ruxton, op.cit., p.118.

This problem does not exist among Northern Nigerian Moslems. The maintenance due to a wife is calculated by exclusive reference to the husband's means, and this, while reasonable enough, is directly contrary to the strict Maliki law.[1]

Customary law, which generally accords more prestige and respect to the senior wife of a polygamist seemed to have triumphed over Islamic law in this respect. Among the Kanuri the senior wife of a man is the head of the household. In most households interviewed, the senior wife directed the activities of the two or three other wives, who had to go to her for everything they needed, including money. The "slave" wives or concubines usually do most of the work in the household.

This special position of the senior wife is observed among all classes of peoplr, including the Shehu of Bornu, whose senior wife is called Gumsu. Interviewees say that formerly the Gumsu of the Shehu was held in high esteem by the entire community. It was customary for her to hold a sort of court to which cases peculiar to women would be brought for decision, and from time to time, laws regulating the conduct of women in all aspects of life were made. Girls attending secondary schools in Maiduguri used to be taken to her for caning, in cases of gross misbehaviour.

Recently, however, the power of the Gumsu seems to have been lessened, or rendered nugatory, because the present Shehu has chosen as his Gumsu the youngest of his wives, and the last to have been married. This breach of custom has created resentment among the older wives of the Shehu, and as a result, whenever the Shehu is absent from the palace, the Gumsu is literally ostracised by the other palace wives, who, however, allegedly maintain a semblance of fraternity when he is present.

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1. See Ahmadu Suka, op.cit., pp.14-15.

Unequal treatment of wives is a frequent cause of complaint among Moslem couples. In a case recorded in the Social Welfare Office in Maiduguri, the husband had three wives. One of the wives complained that the husband had no love for her, and that she wanted to divorce him, but he refused to grant her a divorce. Her reason for wanting a divorce was that the husband gave everything to his senior wife, but nothing to her, or to the one child she had for him. The husband refuted this accusation, and stated that the wife was jealous of his other wives, especially the most junior one, whom he had sent to England to be educated, and who got on well with his senior wife. He described the complainant as a quarrelsome woman who refused to cooperate with her co-wives, but he resolutely refused to divorce her. In another case, the wife, who was the second of three wives, described herself as "one-third wife in the home", and complained bitterly that the husband neglected to buy food, or even medicine for her when she was ill, took no notice of the needs of her seven children, "while he lavished his youngest wife with all she needed".

Barkow has correctly observed that:

> "From a man's point of view the burden of polygamy is that of diplomacy: he must not show favouritism".

The wives must cook for and share the husband's sleeping room in strict rotation, whether they are aged fifteen or fifty, sexually available or socially unclean, and a gift to one wife necessitates a gift to the other, yet "quarrels among co-wives are common, and a polygynous household is seldom a totally peaceful one".[1]

The duty of the husband of an Islamic marriage to maintain his wife may be enforced by the courts. Where a husband, having failed to make adequate provision for his wife, absents himself and cannot be found, the wife may apply to the court for maintenance. Provided she proves her right to maintenance, the Judge has the right to order maintenance for her out of her husband's property. If the

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1. See Barkow, op.cit., p.322.

husband has no personal property, his real property may be sold for this purpose. The wife also has the right to pledge her husband's credit for necessaries on the authority of the Judge.[1] Anderson notes that in Nigeria, however, most Alkalai (Hausa judges) say that they would dissolve the marriage, but would neither seize nor sell property to provide maintenance for a wife.[2]

This reluctance to enforce the husband's duty to maintain his wife may be due to the fact that, according to the customary law of the non-Moslem Hausas, the husband has no obligation to maintain his wife.

(111) Adultery

Consonant with the practice in most traditional societies, adultery in Islamic law is a crime. Zina, illicit sexual intercourse attracts the punishment of stoning in the case of the free offender "who has ever enjoyed valid married life", and one hundred lashes in the case of one who has never had this experience.[3] Illicit intercourse, which includes adultery by either sex, is a criminal offence under the Penal Code Law, 1960 of Northern Nigeria.[4] Sections 387 and 388 of the Law provides:

Adultery by a man

"387 Whoever, being a man subject to any native law or custom in which extra-marital sexual intercourse with a person who is not and whom he knows or has reason to believe is not his wife, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be punished with imprisonment for a term which may extent to two years or with fine or with both".

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1. See Ameer Ali, op.cit., pp.410-414; Ruxton, op.cit., pp.151-152; Jung, op.cit., p.42; See also Schacht, op.cit., p.168; and Abdur Rahim, op.cit., p.334.
2. See further, Anderson, Islamic Law in Africa, pp.210-211.
3. See Anderson, Law Reform in the Muslim World, op.cit., p.100; Coulson, Succession in the Muslim Family, op.cit., p.25.
4. Cap 89, Laws of Northern Nigeria, 1963 Revision. In Obeya v. Soluade and Solicitor General for Benue Plateau State [1970] Suit No. S.C. 125/69, it was held that S.387 of the Penal Code Law does not contravene the freedom from discrimination provision of the Nigerian Constitution, although illicit sexual intercourse is not a criminal offence in the Southern States.

"388 Adultery by a woman — Whoever, being a woman subject to any native law or custom in which extra-marital sexual intercourse is recognised as a criminal offence, has sexual intercourse with a person who is not and whom she knows or has reason to believe is not her husband is guilty of the offence of adultery and shall be punished with imprisonment for a term which may extend to two years or with fine or with both".

Although the crime of adultery under the Penal Code Law may be committed by a married or unmarried person, male or female, in practice, adultery with, and by, a married woman is by far the most serious crime, punishable traditionally among the Kanuri by the lash and even by death in appropriate cases.[1]

Infidelity by husbands, especially in the urban areas, is extremely common. Although it is known and accepted that extra-marital affairs by men are a type of adultery, it is also considered extremely common for married men to have sexual liaisons of shorter or longer duration with unmarried and divorced women.

Barkow notes the double standard of sexual morality which obtains in Hausa Moslem society:

> "Hausa maintain an explicit double-standard and a husband's unfaithfulness is not considered adultery unless it involves a married woman, though a wife who catches her husband with another woman is expected to physically attack her rival. On the other hand, women are accorded considerable liberty between marriages, while accusations of adultery are common: that women are not 'permitted' license does not mean they do not take it".[2]

C. Parental Rights and Duties

Affiliation, Acknowledgement and Custody of Children

(1) Affiliation

As in most systems of customary law, under

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1. See Cohen, Dominance and Defiance, op.cit.,p.107; Anderson, Law Reform in the Muslim World, op.cit., p.100; the prescribed punishment for zina in Islamic law is death by stoning, or one hundred lashes.
2. Barkow, op.cit.,p.323; see also Cohen, Dominance and Defiance, op.cit., p.107; E.R. Yeld,"A Study of the

footnote 2 continued.....

Islamic law the husband of a woman is presumed to be the father of her children conceived during the subsistence of the marriage, and is expressed in the Arabic maxim, al-walad li'l firāsh or, "the child belongs to the marriage bed.[1]

The minimum period of gestation according to all the schools of law is six months, but the maximum period shows considerable variation among the schools. The old Hanifi lawyers, upon the authority of a tradition reported by Ayesha, hold two years as the longest period of gestation. Other schools extend the period to four years and, the period according to the Maliki school varies between four and seven years.[2]

A child born during the idda of its mother, legally belongs to her divorced husband, even if he had no access to her at the relevant time. If, after accomplishing the idda, a divorced woman or a widow remarries, and has a child within six months, the child is affiliated to the husband to whom she was married immediately preceding the idda, and her second marriage would be voided by judicial decree.[3]

The presumption of paternity, except in Shi'i law, is not rebutted by proof of non-access between the

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Footnote 2 continued..... Social Position of Women in Kebbi", (Northern Nigeria), M.A. Thesis University of London, 1960, p.55.

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1. See Coulson, Succession in the Muslim Family, op.cit., p.23; Schacht, op.cit.,pp.21,39; Ameer Ali, op.cit., p.191; Abdur Rahim, op.cit.,pp.341-343; see also Ashrufood Dowlah Ahmed Hoosein Khan Bahadur v. Hyder Hossein Khan [1866] 11 Moo. I.A.94, 113 where the Privy Council laid down the principle that under Mahommedan law, "the presumption of legitimacy from marriage follows the bed and is not ante dated by relation".

2. See Ameer Ali, op.cit.,p.191; Ruxton, op.cit., p.41; Coulson, op.cit., p.24; Levy, op.cit., p.135.

3. See Ameer Ali, op.cit.,p.194 who asserts that the maximum period after a divorce is now 10 months unless there is any exceptional circumstances retarding the birth of the child.

spouses at any possible time of conception.[1] A repudiation of paternity by the husband involves an accusation of illicit intercourse (zina), which is a criminal offence with a penalty of whipping attached, and which, in theory, can only be proved by the testimony of four eye-witnesses to the very act of sexual intercourse.[2] The practice under traditional Sunni law, however, is for a husband who wishes to repudiate the paternity of a child born to his wife, to swear four oaths (taking the place of the four witnesses required to prove zina) that the child is not his, and then invoke the curse of Allah upon himself if he is lying. The court will then pass a decree dissolving the marriage and declaring the child illegitimate. The wife may then take four contradictory oaths and also invoke the curse of Allah upon herself if she is lying. But whether she does so or not, only affects the question of her punishment for zina. This procedure is known as liān and illustrates the partiality of Islamic law towards the male sex. The wife's knowledge of the paternity of her child is more certain than her husband's, and yet the law, upon his evidence alone, declares the child a bastard.[3]

Anderson notes that cases of liān are not frequent in Nigeria.[4] Probably this is because a Nigerian Moslem man in the North is satisfied with simply divorcing the wife if he suspects infidelity, and the pregnant wife thus repudiated, is too scared to go to the courts.[5] Numerous

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1. See Coulson, op.cit., p.25.
2. See Anderson, Islamic Law in Africa, op.cit., p.194; the orthodox rule is generally applied in Northern Nigeria, although a charge on the same facts couched in different terms can be sustained by the normal minimum of two witnesses.
3. See Coulson, op.cit.,p.25; Ameer Ali, op.cit.,p.195; Abdur Rahim, op.cit.,p.342; Fitzgerald, op.cit., pp.82-83.
4. Anderson, Islamic Law in Africa, op.cit., p.213.
5. See Ameer Ali, op.cit.,p.196 who asserts that a proceeding by li'aan is resorted to only where the husband makes the charge.

cases are recorded in the Social Welfare Office of Moslem husbands denying paternity, and refusing to support children whom they suspect are not their own. Unlike Yoruba men, who have a penchant for claiming paternity of children whom they know are not theirs, Moslem men in the North renounce their legal right to such children, and if the natural fathers also refuse to maintain the children, the mothers and children are left destitute.

(11) Custody of children

Islamic law makes a distinction between custody and guardianship of children. A Moslem mother has the right of custody (hidanah) of her male child until he reaches the age of puberty, and of her female child until the girl's marriage. The guardianship of all children, however, remains with the father, who has the duty to maintain them, whether he is living with them or not, to watch over their moral education, to correct them and send them to school, or to a master or mistress who may instruct them.[1] In Maliki law, the father may appoint an executor as guardian of his children after his death. The appointment vests in the executor all the rights of the father pertaining to jabr.[2]

If the mother remarries, or for some reason is adjudged unsuitable to take care of the child, there is a prescribed order in which custody will revolve, which varies considerably among the various schools of law, but generally, the maternal female relatives of the child will be given precedence, even over the father himself. For example, according to Maliki law, the child's maternal

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1. See Ruxton, op.cit.,p.155; see also Ameer Ali, op.cit., p.248 et.al.,for the variations in regard to custody among the schools of law. See also Anderson, op.cit., pp.214-215.

2. See Ruxton, op.cit.,p.93; see further below, pp.41-42.

grand-aunts take precedence over the child's father for a grant of custody.[1]

It can therefore be seen that, compared to customary law,[2] or early English law,[3] Islamic law has always adopted a more practical and realistic approach to the custody of children. It recognizes the fact that all things being equal, a child's mother is the best person to be given custody of her children. The law also recognizes the fact that a child usually feels greater affinity with its mother's relations than those of its father, and the further fact that a child is usually cared for by a woman. The law will not award custody to a male, unless he can prove that he has a capable woman to look after the child.

The paramount welfare of the child has always been the prime consideration in Islamic law, and consequently "custody is given to those persons most likely to bestow care and kindness on it".[4] The almost absolute right of custody which is given to a mother is lost however, -

(i) by her subsequent marriage to a person not related to the infant within the prohibited degrees of marriage;

(ii) by her change of residence which would prevent the father or tutor from exercising the necessary supervision over the child; the distance should not exceed six barîd;[5]

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1. Ibid., p.155; Ameer Ali, op.cit.,pp.253-254 for the order of priority in Maliki law and, according to the other Schools of Islamic law.

2. For the position under customary law, see above, Chapter VII, pp.609-613.

3. See below, Chapter XI, pp.221-225.

4. No male has the right of custody to a female child unless he is within the prohibited degrees, and consequently cannot marry her under Islamic law.

5. A barîd is the interval between two stages, see Ruxton, op.cit., p. 156; in Nigeria a barîd is calculated as 12 miles, see below, p.80.

(iii) by her abduration of Islam;[1]

(iv) by her misconduct, neglect of, or cruelty to the child;

(v) by a change of residence of the child's father or legal guardian beyond six barid.

The courts in the Northern States of Nigeria seem to observe the strict rules of Maliki law governing the custody of children as is illustrated by two decisions of the Sharia Court of Appeal in Maiduguri.[2]

In the first of the two cases, Mikakila Yorubo v. Jumai Kaburi[3], the plaintiff husband sued his former wife, claiming custody of two female children, aged five and seven years, on the ground that the wife was planning to take the children to the Sudan without his knowledge. The wife denied this, and said that she was maintaining the children without any maintenance from the plaintiff, but as soon as she applied to the court claiming help from him, he said he wanted the children. The children were brought into court and interviewed by the Judge. The pertinent part of the judgment read as follows:

> "In accordance with Islamic law, the upbringing of either son or daughter remains with the mother and the feeding with the father until such time that the son/daughter reached the age of puberty. Because of this, the daughters will not be taken away from her".

The court decided that the children should live with the mother; the father was ordered to maintain the children. The judgment of the trial court was upheld in

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1. See Ameer Ali, op.cit., pp. 256-268, p. 261.

2. The right of hidânah appertains equally to non-Moslem mothers, see Ameer Ali, op.cit., p. 225. Some courts in Nigeria follow the variant Maliki view which corresponds more closely to local custom, that a boy may be claimed by his father or other guardian at between five and seven years of age; see Anderson, Islamic Law in Africa, op.cit., pp.214-215. See also Yahaya Kanam, "The Effect of Custom on Certain Aspects of Maliki Law in the Northern States of Nigeria", Journal of Islamic and Comparative Law, Vol.2, 1968, pp. 79-87 at p.85; Anderson, Adaptation of Muslim Law, op.cit., p. 154.

3. [1973] Appeal No. SCA/CV/11/BO/73, unreported, Sharia Court of Appeal Maiduguri, 1973. Translated from the

footnote 3 continued.....

further appeals to the Upper Area Court, and Sharia Court of Appeal.

In the other case of Goni Madu Damboa v. Ya Ashe,[1] the father claimed his daughter, aged nine years, from the custody of her maternal grandmother. The grandmother objected to his claim on the ground that the plaintiff divorced his wife (her daughter), who returned home five months pregnant. She delivered the child, who was now nine years old, and that during all that time, she (the grandmother) was the one who took care of the child, providing clothing, food and schooling. She also claimed that for the nine years she looked after the child, the father never came to see the child, nor sent a message of greeting, and that taking away the child from her would be a miscarriage of Sharia (justice). However, she agreed that, as the father, he could take the child when she attained the age of majority, during which he would give her hand in marriage.

The trial Judge based his judgment on the Sharia, and cited his authority from a book of Islamic Jurisprudence - Muhammadiyati - which says that "it is not allowed for a father to take away his daughter from the hands of her grandmother, until she attains the age of majority and is ready for marriage".

The father appealed to the Upper Area Court, stating that he was moving from his present address to Damboa and wanted to take his daughter with him so that she can go to school there, a fact he had not mentioned in the court of trial. The Upper Area Court held that "it would be unfair to separate the daughter from living with her father, since the law was that the daughter should stay together with her father at his own domicile". The

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Footnote 3 continued..... Kanuri language by Elisha Samwarenso, Law Student, University of Maiduguri. Thanks are hereby recorded.

1. [1975] Suit No. SCA/CV/30/BO/74, unreported, Sharia Court of Appeal, 5th March, 1975. Translated by Abrahim M. Bukar, see above, p. 78,n.3.

Judge gave as authority for his judgment, a passage from Tufatun Hakkami, a Sharia text, Vol.1, page 275. The appeal was allowed and the father granted custody.

The grandmother appealed to the Sharia Court of Appeal. The Sharia Court based its decision purely on Islamic law, and cited as their authority, Bahja, Commentary on Islamic law of Tufatun, Vol. 1, page 411. which says that "if the father or guardian migrates from where the daughter, or son, is living to a new town, he is required to take the child with him even if the person looking after the child refuses to follow him to his new domicile. This, however, is subject to the condition that the migration is at least a distance of 72 miles, or six barid".

The court calculated the distance of the proposed migration as 70 miles and said:

> "Under Sharia it is said that the least distance of migration is 72 miles, then the responsibility of taking care of the child by the grandmother will fail. However, the least distance required by Sharia is not complete, and thus this Honourable Court is of the view that there is no any [sic] reason why the child should be taken away from her grandmother, Ya Ishe, because the child is under her care, and Sharia has no concrete reason in taking the child away from her".

The Sharia Court set aside the decision of the Upper Area Court, and confirmed the decision of the trial court. The father was ordered to execute all the responsibilities which fell on him as a father, and the grandmother to have custody until the marriage of the daughter.

This case illustrates the technical approach adopted by the Moslem Judges in the Northern States, in their application of Islamic law. In the circumstances, justice was done, but since justice more or less depended, not on principles, but on mileage, the decision could easily have swung the other way, had the proposed migration been seventy-two instead of seventy miles. Two miles tipped the scale in favour of justice. Nothing was said by any of the Judges about the dominant principle of Islamic law - the paramount welfare of the child. Had this principle been applied, the basis for the decision

would have been more logical, although the decision might have been the same, since a father who, without any good reason, made no effort to see or provide sustenance for his child for nine years, could hardly be regarded as the most likely person to bestow care and kindness on the child.

The decision could also be compared with Aja v. Ejiofor,[1] where the custody of a child who had been cared for by her uncle, from birth to fourteen years of age, was given, in accordance with customary law, to a man who was not her natural father, and who had disclaimed her at birth as a bastard, but whose dowry paid on her mother had not been repaid at the time of the child's conception.[2]

(111) Acknowledgement of children

It is possible for a father to acknowledge a child as his own under Islamic law. Unlike acknowledgement of a child under customary law, however, acknowledgement under Islamic law assumes a prior marriage, and a child who is the product of an illicit relationship cannot generally be acknowledged.[3] Ameer Ali asserts.

> "The acknowledgement of legitimacy proceeds upon the basis of a prior lawful relationship between the parents".[4]

For a valid acknowledgement under Islamic law, there must be -

(i) no bar to the marriage of the acknowledger and the mother of the child;

(ii) nothing to render the relationship impossible (for example, the ages of the acknowledger and the child must not be such that the former cannot possibly be the father of the latter);

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1. [1974] Suit No. HO/10A/74, unreported decision of Okigwe High Court.

2. For the facts of this case and comments thereon, see above, Chapter VII, p.598.

3. Ameer Ali, op.cit., pp.218-223.

4. Ibid.,p.223; Ashrufood Dowlah Ahmed Hoosein Khan Bahadur v. Hyder Hossein Khan [1866] 11 Moo. I.A.94; Mardansaheb and Ors.v. Rajaksaheb and Ors.[1910] 34 I.L.R. Bombay, 111; it is not permissible to acknowledge a child born of zina.

(iii) no proof that the acknowledger is not the father of the child, for example, that he is the child of another man;
(iv) consent of the person to be acknowledged, if an adult, to the acknowledgement.[1]

Acknowledgment under Islamic law can be contrasted with legitimation per subsequens matrimoniam in English law,[2] and acknowledgment in Yoruba Customary law.[3] Islamic law, like the English common law, does not recognize the legitimation of ante-nuptial children by the subsequent marriage of the parents; and it also refuses to attach the status of legitimacy to any child not conceived, though born, in wedlock.[4]

6. The Status of Women on the Dissolution of Marriage

Dissolution of marriage under Islamic law may be effected by:
(i) divorce; or
(ii) death of either spouse.

A. Divorce

(1) Divorce in Islamic law

As shown in chapter six, the right of divorce in most traditional societies was regarded as a natural

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1. See Ameer Ali, op.cit.,pp.218-223; Seymour Vesey-Fitzgerald, Muhammadan Law, An Abridgement (London: Oxford University Press, 1931, p.92.
2. See the English Legitimacy Acts 1926 and 1929; and Bromley, Family Law, op.cit., pp.292-297. See also the Legitimacy Act 1929, Cap 103, Laws of the Federation of Nigeria, 1958 revision, and similar statutes in the States.
3. See Nwogugu, Nigerian Family Law, op.cit.,pp.229-239, A.B. Kasunmu, "Adultery, Acknowledgement and the Illegitimate Child in Nigeria," U.G.L.J., Vol. X, 1973, No. 1,pp.1-15; Nwogugu, "Legitimacy in Nigerian Law", [1964] J.A.L. Vol.8, No. 2, p.97.
4. See Ameer Ali, op.cit., pp.199-200.

corollary to the marital relationship, and in some communities was exclusively vested in the husband. Several authorities testify to the fact that prior to Islam, divorce among the ancient Arabs was easy and of frequent occurrence.

Ameer Ali says:

> "The pre-Islamic institution of divorce required no formula to make its operation valid, and as there was no check on the irresponsible power of the husband, a simple intimation from him to the effect that the tie was dissolved was considered sufficient".[1]

Ease of divorce by the husband has been preserved to a large extent in Islamic law, and is responsible more than any other factor for the opprobrium with which Islamic marriages are regarded by moralists. "The law of divorce" says Fyzee, "whatever its utility during the past, was so interpreted, as least in the Hanafi school, that it had become a one-sided engine of oppression in the hands of the husband"[2] Similarly Coulson notes that

> Without doubt it is the institution of talāq which stands out in the whole range of the family law as occasioning the gravest prejudice to the status of Muslim women,....[3]

A Moslem husband has the power to terminate his marriage unilaterally at his absolute discretion and without assigning any reason therefor. No intervention by the court or any other official body is required, and repudiation of a wife may be effected simply by the husband pronouncing the appropriate words. This form of divorce, known as talāk, signifies in law, the absolute power which the husband possesses of divorcing his wife at all times, while a reciprocal power of divorce is denied to the wife.[4]

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1. Ameer Ali, op.cit., p.473.
2. Fyzee, op.cit., p. 148.
3. Coulson, Islamic Jurisprudence, op cit., p.45.
4. See generally, Ruxton, op.cit.,pp.121-133; Jung, op.cit., pp. 46-57; Ameer Ali, op.cit., pp.473-492.

Divorce is said to be repugnant to the Muhammadan religion and "should not be resorted to unless it has become impossible for the parties to live together in peace and harmony, but once it is pronounced it is upheld as valid although there may be no good cause for it".[1]

Divorce is described in a precept of the Prophet as "the worst of all things which the law permits",[2] and a most abominable act hated by God".[3]

In spite of the ease with which divorce may be effected by a Moslem husband, in the contemplation of Sharia law, marriage, or nikah, must be intended as a life-long union, hence in Sunni law, any condition or stipulation by which the parties seek to set a time limit to their union renders the whole contract a nullity, since it is an agreement contrary to the essence of marriage.[4]

Divorce in Islamic law may be of three kinds:

(a) by prouncement of talak by the husband;
(b) by common consent of the parties;
(c) by judicial process, usually at the suit of the wife.

(a) Divorce by Talak

Talak, or divorce pronounced by the husband, may be revocable or irrevocable. A divorce is revocable when the husband is able to retract it during the idda of the wife. However, he is not allowed to withdraw a repudiation against the same wife more than twice, hence a third talak is final and irrevocable. Divorce is said to be irrevocable also if pronounced once only, while the wife is in a state of purity (tohur), provided there is no sexual intercourse between the parties during that period, and until

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1. Abdur Rahmin, op.cit., p.335.
2. Ibid.,pp.335-336.
3. Ameer Ali (Syed), Position of Women in Islam,op.cit. Rafiq, op.cit., p.11.
4. See Abdur Rahim, op.cit., p.328; Coulson, Succession in the Muslim Family, op.cit.,p.17; Schacht, however, notes that the effect of a temporary marriage (mut'a) can be achieved by an informal agreement outside the contract of marriage, see Schacht, op.cit., p.163.

completion of the wife's idda. Divorce is irrevocable upon the pronouncement of words expressing irrevocability, for example, "I have divorced thee irrevocably", or "I divorce thee", said three times in succession, or "I have divorced thee thrice", if only said once.[1]

Immediate irrevocable divorce is regarded as particularly "blameworthy" from a moral standpoint, but nevertheless it is legally valid.[2]

A pronouncement of divorce by the husband is valid even if said in jest, or in a moment of anger, provided he is of sound mind, is not a minor, and is awake.[3] According to Maliki law, divorce pronounced by compulsion is invalid.[4]

The divorce operates from the time of the pronouncement of talak. The presence of the wife is not necessary, nor need notice be given to her.[5] It is forbidden for a man to repudiate his wife during her menstrual period, and according to Maliki law, a husband who does so will be constrained to take her back, and may be imprisoned and even beaten if he fails to do so.[6] Repudiation of a wife cannot be qualified by an option, but it may depend on the fulfilment of a condition. Repudiation may be effected by an agent of the husband, who may even be the wife herself.[7] Fyzee notes that this type of delegated

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1. See Ruxton, op.cit., p. 129.
2. See Schacht, op.cit., p. 164.
3. See Jung, op.cit., p.50; Abdur Rahim, op.cit., p.337.
4. See Ruxton, op.cit., p.128; The Hanafi jurists consider divorce under compulsion as binding, see Jung, op.cit., p.49; Abdur Rahim, op.cit.,p.337.
5. See Mohammad Shamsuddin v. Noor Jahan Begum [1955] 1.L.R. - Hyd. 418.
6. See Ruxton, op.cit., pp.127-128; but see Abdur Rahmin, op.cit., pp.336-337, a divorce pronounced while the wife is not in a state of purity is valid, although not regarded with approval.
7. See Ruxton, op.cit., pp. 131-132.

divorce is perhaps the most potent weapon in the hands of a Moslem wife to obtain her freedom without the intervention of any court and is now beginning to be fairly common in India. An agreement by which the husband authorizes the wife to divorce herself from him has been repeatedly held to be valid and irrevocable in the Indian courts,[1] but it is doubtful whether it would be so regarded by the majority of Nigerian Moslem jurists.

A repudiation which is effected by a third person who is neither an agent nor a proxy, but who has merely the husband's vague directions, has the same validity as a bargain concluded by a third person who is not the recognized agent of the buyer.[2]

This unfortunate position of the wife under classical Islamic law, with reference to divorce, is compounded by the fact that the power of divorce granted so liberally, to the husband, is virtually denied to the wife. The ease with which a husband can divorce his wife is only matched by the difficulty she faces when she wishes to divorce him against his wishes.

(b) Divorce by mutual consent

A divorce may be effected in Islamic law by the mutual consent of husband and wife. If the desire to separate emanates from the wife, it is called khul, but if the divorce is effected by mutual aversion (and consent) it is known as mubāra'a.[3] Fyzee asserts that

> "Dissolution of marriage by the common consent of the spouses is a peculiar feature of Islamic law. Prior to Islam the wife had practically no right to ask for a divorce; it was the Koranic legislation which provided for this form of relief".[4]

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1. See Fyzee, op.cit.,p.159; see also Fyzee, "The Muslim Wife's Right of Dissolving Her Marriage", 36 Bombay Law Report, 1936, pp. 113 and 123.
2. See Ruxton, op.cit.,p. 128.
3. See Coulson, Succession....,op.cit.,p.19; Ameer Ali, op. cit.,p.507; Ruxton, op.cit., p.121,
4. Fyzee, op.cit., p.163; but see R. Smith, op.cit.,p.112 et.al., who says that khul was known even before Islam. The first instance of Khula recorded by Muslim historians is the classical case of Sabit-bin-Kais, see Jung, op.cit., p.54.

Contrary to this assertion, divorce by mutual consent is permitted by most customary law systems which allow divorce to a wife. It has been seen previously,[1] that in most systems of customary law, the husband has unrestricted power to divorce his wife, although the formality involved may be greater than it is under Islamic law. In many systems, the wife has a similar right. Where both parties agree to the divorce, the position is rendered easier, and many divorces are actually effected by the mutual consent of the parties. The inducement offered by either party for the consent of the other is legally immaterial.

In Islamic law financial compensation is usual, but except in Shafi'i law, is not an essential part of khul. Fyzee points out that

> "The true position is that once common consent is proved and the dissolution has been effected, the question of releasing the mahr or making compensation is a question of fact to be determined with reference to each particular case, and there is no general presumption that the husband has been released of his obligation to pay dower".[2]

It seems that under Maliki law, release of a wife from her marital bonds is "also lawful even without an indemnity or compensation being paid (musara'a)".[3]

The nature of a divorce by talak and by khul was explained fully in the Indian case of Moonshee Buzul-ul-Rahim v. Luteefut-oon-Nissa[4] as follows:

> "A divorce by Talâk is the mere arbitrary act of the husband, who may repudiate his wife at his own pleasure, with or without cause. But if he adopts that course he is liable to repay her dowry, or dyn-mohr, and, as it seems to give up any jewels or paraphernalia belonging to her.
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> "A divorce by koola [khul'] is a divorce with the consent, and at the instance of the wife, in which

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1. See above, Chapter VIII.
2. See Fyzee, op.cit., p.165.
3. Ruxton, op.cit.,pp.122-123.
4. [1861] 8 Moo. 1.A.379.

she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are a matter of arrangement between the husband and the wife, and the wife may, as the consideration, release her dynmohr and other rights, or make any other agreement for the benefit of the husband".[1]

While khul' may not have been present in customary law, mubāra'a certainly was in most systems.

Khul' and mubāra'a operate as a single irrevocable divorce, therefore marital life cannot be resumed unless there is a formal remarriage.[2]

(c) Divorce by judicial process

Marriage may also be dissolved in Islamic law by a judicial divorce granted by a court. The Maliki school is most liberal in its provisions enabling a wife to obtain divorce from her husband in a court of law, although the other schools, to varying degrees, also recognize the right of a wife to petition for judicial divorce on the broad ground of the husband's failure to fulfil his marital duties.[3] The grounds on which a Maliki wife may obtain a judicial divorce have been summarised by Coulson under four major heads.[4]

(i) Physical or mental disease: which covers all cases of serious illness of the husband which would jeopardise the health of the wife if the marriage is allowed to continue.

(ii) Failure to maintain: whether due to inability or wilful refusal of the husband to do so.

(iii) Desertion: even where property of the husband is available to provide the wife with maintenance and

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1. Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa [1861] 8 Moo. I.A.379 at 395: Fyzee Cases, op.cit., pp.159,167.
2. See Fyzee, op.cit.,p.166; Coulson, Succession..., op.cit.,p.19.
3. See Coulson, Succession..., op.cit., p.19; traditional Hanifi law knows no doctrine of dissolution of marriage by judicial decree. If a decree of divorce is granted for a cause imputable to the husband, it has, generally speaking, the effect of faskh or annulment of marriage, see Abdur Rahim, op.cit.,p.329.
4. See Coulson, Succession..., op.cit., pp.19-20.

support, she is entitled to a dissolution where the husband has absented himself without lawful reason and thus deprived her of the right of consortium.

(iv) Prejudice (Arabic darar), a residual ground which includes the husband's physical or mental cruelty, and also covers cases of incompatibility which in effect amounts to a decree of divorce based on the irretrievable breakdown of the marriage.

Judicial divorce and the procedure to be adopted to effect it are sanctioned by the Koran.

> "Virtuous women are obedient, careful, during the husband's absence, because God hath of them been careful. But chide those for whose refractoriness ye have cause to fear; remove them into beds apart, and scourge them: but if they are obedient to you, then seek not occasion against them: verily God is High, Great".[1]
>
> And if ye fear a breach between man and wife, then send a judge chosen from his family, and a judge chosen from her family: if they are desirous of agreement, God will effect a reconciliation between them".[2]

These arbitrators, trustworthy adult men, are not mere observors or witnesses, but judges who decide whether there should be a divorce or not. According to strict Maliki law, if they decide on a divorce, their declaration to this effect has the force of a judicial decree. The judgment of the Kadi is not required.[3]

In Nigeria, at least at Maiduguri, such arbitrators act as advisors, and judgment is pronounced by the Kadi who invariably acts on their advice. The first duty of the court, through the arbitrators, is to endeavour to reconcile the parties. If reconciliation is impossible, and the husband is at fault, divorce is granted without compensation by the wife. If the wife is at fault they settle the amount which will secure her release, or they may refuse a divorce entirely.

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1. Rodwell, The Koran, op.cit., Sura IV, Verse 38, p.415.
2. Ibid., Verse 39, p.415.
3. See Ruxton, op.cit., p.120. Women are ineligible to act as arbitrators.

(d) Revocation of divorce and remarriage

If the pronouncement of divorce is revocable, a reconciliation between husband and wife can take place during the wife's idda without a regular remarriage. The reconciliation may be by a formal revocation of talak or by resumption of marital life. The husband may revoke his pronouncement of divorce even against the wishes of the wife.[1]

In the case of an irrevocable divorce, however, the parties may only be remarried if

(i) the wife observes idda;
(ii) after observing idda the wife marries another husband;
(iii) this second marriage is actually consummated and lawfully dissolved, and
(iv) iddat is observed after the dissolution of the second marriage.[2]

If this procedure is not followed, remarriage to the former husband is batil and of no legal effect whatsoever. Consequently any children born after such remarriage are considered illegitimate.[3]

The provision of a temporary husband in order to legalize remarriage with a thrice-divorced wife has Koranic approval.

> "Ye may divorce your wives twice: Keep them honourably, or put them away with kindness...But if the husband divorces her a third time, it is not lawful for him to take her again, until she shall have married another husband; and if he also divorce her, then shall no blame attach to them if they return to each other, thinking that they can keep within the bonds fixed by God".[4]

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1. Ruxton, op.cit., p.132; Abdur Rahim, op.cit.,pp.337-338.
2. See Schacht, op.cit.,p.164; Abdur Rahim, op.cit.,p.337.
3. See Ameer Ali, op.cit., pp.202-205, for the rules of the various schools of law.
4. Rodwell, The Koran, op.cit.

Why did the Prophet Muhammad make such a law?

Various reasons have been advanced for the rule specifying the procedure for remarriage. It is said that the rule rendered obsolete "a great engine of oppression in the hands of the pre-Islamic Arabs, who could keep their wives in a species of perpetual bondage, pretending to take them back after repeated divorces, merely for the purpose of preventing the wives from remarrying and from seeking the then much needed protection of a husband".[1] Another opinion is that the professed object of the law in adding this condition is to punish the former husband for his conduct in divorcing his wife, and to discourage hasty divorces.[2]

Cases of temporary husbands in order to legalize remarriages were of frequent occurrence. Muir, quoting Burckhardt "A thousand lovers rather than one Mostahil; i.e. many lovers or gallants cause less shame to a woman than one Mostahil (i.e. husband procured for the occasion) says:

> "According to the Moslem law, a person who has (thrice) divorced his wife cannot remarry her until she has been married to some other man, who becomes her legitimate husband, cohabits with her for one night, and divorces her next morning; after which the first husband may again possess her as his wife. Such cases are of frequent occurrence - as men in the haste of anger often divorce their wives by the simple expression (I divorce thee), which (thrice repeated) cannot be retracted. In order to regain his wife a man hires (at no inconsiderate rate) some peasant, whom he chooses from the ugliest that can be found in the streets".[3]

Muir maintains that it is a sorry excuse that by this provision Muhammad wished to check inconsiderate divorce, since a good object is not to be sought for by such evil means. He says of the Koranic provision:

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1. Faiz Badruddin Tyabji, Muslim Law (Bombay, 4th. edit., 1969), p. 84.
2. See Abdur Rahim, op.cit., p.337; cf. Anderson, Law Reform in the Muslim World, op.cit., pp.72-73.
3. See Muir, op.cit., p.326.

> "Such flagrant breach of decency, such cruel violation of the modesty of an unoffending wife, may be an abuse the full extent of which was not at that time contemplated by Mohamet; but it is not the less an abuse for which, as a direct result of the unnatural and revolting provision framed by him, Mohamet is responsible".[1]

Divorce in Northern Nigeria

Ameer Ali's statement that divorce is rare among advanced Moslem communities,[2] does not represent the present position among the Moslem population of Northern Nigeria, where the instability of marriage and family life has reached alarming proportions. Anderson noted in 1959 that

> "the number of divorces which occur in Northern Nigeria today is causing widespread anxiety among all thinking men and many suggestions have been made as to how the situation might be remedied".[3]

Nearly two decades later, the position has probably deteriorated even further, and some communities, for example, the Kanuri of Bornu State, allegedly have some of the highest divorce rates ever recorded.[4] As Tables 9:1 and 9:2 show, of the 52 Kanuri women interviewed during field-work in Maiduguri, 25 percent (13) were recorded as having married once only. Of the 16 women above the age of fifty, only one woman was married once only. The highest percentage of the women, 53.8 percent, were married two or three times and the 52 women together recorded a total of 135 marriages, an average of 2.6 marriages for each woman. The rate of divorce is even higher among the men. The 54 Kanuri men interviewed registered 201 marriages, an average of 3.7 marriages per man. The highest percentage of men, 42.6 married four or five times and the four men above the age of fifty recorded forty marriages, an average of 10 marriages per man.

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1. Ibid., p.326.
2. See Ameer Ali (Syed) Legal Status of Muslim Women, op.cit., pp.38-39; see also Abdur Rahim, op.cit., pp.340-341.
3. Anderson, Islamic Law in Africa, op.cit., p.212.
4. See Cohen, Dominance and Defiance, op.cit., p.125.

TABLE 9:1

INCIDENCE OF MARRIAGES REPORTED BY KANURI MEN AND WOMEN INTERVIEWED AT MAIDUGURI, ACCORDING TO AGE GROUPS

Number of times married	below 30 yrs.		30-50 yrs.		Above 50 yrs.		Total Number Interviewed		Total Number of Marriages	
	Wom.	Men	Wom.	Men	Wom.	Men	Wom.	Men	Wom.	Men
Once	8	6	4	-	1	2	13	8	13	8
Twice	-	1	6	5	4	3	10	9	20	18
Three times	5	2	7	6	6	2	18	10	54	30
Four times	1	2	3	3	3	5	7	10	28	40
Five times	-	-	2	9	2	4	4	13	20	65
Eight times	-	-	-	-	-	1				
Ten times	-	-	-	-	-	2				
Twelve times	-	-	-	-	-	1				
	14	11	22	23	16	20	52	54	135	201

TABLE 9:2

INCIDENCE OF MARRIAGES REPORTED BY KANURI MEN AND WOMEN INTERVIEWED AT MAIDUGURI BY PERCENTAGES

Number of times married	Women (N.52) %	Men (N.54) %
Once only	25	14.8
Two or three times	53.8	35.3
Four or five times	21.2	42.6
Eight or more times	Nil	7.4
	100.0	100.1

These figures, although representing a very small section of the community, compare approximately with other surveys. For example, in 1971, Cohen in a sample of 116 Kanuri men and 99 women, drawn equally from rural and urban areas, found that the men had married a total of 504 times (an average of 4.4 marriages per man) while the women reported 237 marriages (an average of 2.4 marriages per woman).[1] Of the 116 men, 10.6 percent were married ten or more times, and 2.7 percent twenty or more times.[2]

Cohen also compiled data of divorce rates from other parts of Africa, and from the United States of America which showed that "Kanuri rates in general are among the highest ever recorded.

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1. Cohen, Dominance and Defiance, op.cit., p.67.
2. Ibid., p.66, Table 6:1.

TABLE 9:3

KANURI DIVORCE RATES WITH COMPARABLE DATA FROM OTHER SOCIETIES

Society	Divorce rates in percentages		
	A	B	C
Urban Kanuri (men)	74	98	75
Rural Kanuri (men)	52	79	56
Kanuri (corrected)	54	81	58
Bakweri (women)	42	66	54
Yao (women)	35	68	41
Ngoni (both sexes)	29	56	37
U.S.A. (1950, both sexes)	3	22	3

SOURCE: Cohen, Dominance and Defiance: A Study of Marital Instability in an Islamic African Society, Table 10:2, p.125.

A = the number of divorces as a percentage of the total number of marriages.

B = the number of divorces as a percentage of all completed marriages.

C = the number of divorces as a percentage of all marriages, except those ending in death; See Cohen, op.cit., p.124.

Although marriage instability seems to be highest among the Kanuri, other Moslem tribes of Northern Nigeria also record high frequency rates of marriage. For example, of the 27 women married to Hausa men interviewed by Hardiman,[1] 55.6 percent (15) of them married once only, 37 percent (10) married twice, 3.7 percent (11) married three times, and 3.7 percent (1) married four times. These figures may be compared with the 10 women married to Yoruba/ Ibo men, interviewed in the same survey, 90% of whom were

1. See Margaret Hardiman, Women in Maiduguri, Report of Household Survey, Max Lock Group (Nigeria) Planning and Development Consultants, Part 7, Chapter 6, Table 6, p. 7.6.11.

married only once and 10 percent, twice.

Data from Zaria suggest that on the average Hausa women marry three or four times each.

Smith notes that among the Hausa "divorce is both frequent and easy, and the general desire for two wives apiece to safeguard them against dependence on one mate is itself a factor in maintaining the high rates of divorce".[1] Begho states that there were 46,868 cases of divorce recorded in Kano Emirate alone in 1958.[2] Barkow notes that it is very common for a Hausa woman to be almost automatically divorced when she reaches the menopause, and that at least 35 percent of the women forty-five years of age or older he interviewed in one village were no longer married, compared to only 4 percent of the 30-44 age group.[3]

Moslem husbands divorce their wives with little or no provocation. In the Northern States it is the practice for a husband who has divorced his wife to give her a "letter of divorce". Without such authority, another man might refuse to marry her, since the former husband could easily deny his verbal renunciation. Some men who have divorced their wives, spitefully refuse to give them such a letter, hoping thereby to hamper the wives' chances of remarriage.

In one unfortunate case brought to the Social Welfare Office in Maiduguri, the husband refused to give his divorced wife a divorce letter, but when she took her case to the Market Area Court she was told by the Judge that he "would not solve the case with them since they have already divorced themselves". Although she was pregnant by him, the wife's lover refused to marry her or to even maintain her unless she produced a letter of divorce from her husband. She was in a dilemma, because she could not get a divorce either from her husband or from the court, and she could not get a man to marry, or be responsible for her unless she was divorced. She was the victim of

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1. Smith, Government in Zazzau, op.cit., p. 296.
2. Begho, op.cit., p.50.
3. Barkow, op.cit.,p.320.

an archaic law, which has outgrown what usefulness it may have at one time possessed. Even when a letter of divorce is actually given, the husband may continue to deny the divorce. In one of the cases recorded in the Social Welfare Office, Maiduguri,[1] the husband asked the Welfare Officers in Kano to send back his wife and the child she had delivered for him in Maiduguri. Officers in Kano, after investigation, replied that he had divorced the wife when she was eight months pregnant and that the wife had shown them the letter of divorce duly signed by the husband which stated: "I divorce you. And after you deliver, you can marry any one you like. I wish you safe delivery". Confronted with this evidence the husband confessed that the letter had been written in anger. He continued to demand the return of his wife.

In another case,[2] the husband claimed that the wife was quarrelling with the housegirl. He tried to settle the matter. The wife told him she could get married to some one else if she wanted to. He told her to go ahead and do so. She packed her clothes, and when she was leaving, she asked him for a divorce paper. He gave her a letter of divorce. Later the wife wanted a reconciliation and said that it was anger that caused her to ask for the divorce letter, but the husband refused to take her back. The Social Welfare Officers were able to persuade him to pay her ₦6.00 a month maintenance allowance.

A divorce letter is usually a simple one. A typical example follows.

20/6/72

" To whom it may concern.

This is to certify that I the undersigned had devorced [sic] my wife by name S.P and henceforth duly authorise her to be married to anybody of her choice.

Signed. J.K.B."

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1. File No. SWO/FCW/50, dated 8 Nov. 1977.
2. File No. SWO/17/117. The actual names of the parties have been withheld in order to protect their identity.

Once such a letter is given, divorce is irrevocable, but if both parties want reconciliation, nothing stops them in fact, though not in law, from resuming marital life. There were many instances recorded of couples divorcing and remarrying without any formalities, and it is doubtful whether the more uneducated elements of the society make a distinction between revocable and irrevocable divorce.

Cohen notes that the relative ease of divorce cannot fully explain the frequency of marital breakups, and quotes the example of North Dokota where, until recently, it was easier to obtain a divorce on legal grounds than in most of the States of the United States of America. Yet Dakota had, if anything, more stable unions than some other parts of the country.[1] This is confirmed by the relative ease with which a husband in most systems of customary law in the Southern States of Nigeria could repudiate his wife, but until recently, divorce was relatively rare among such peoples.

Although ease of divorce may not be the most potent factor contributing to instability of marriage, there is no doubt that when a marriage can be effectively dissolved by the utterance of a few words said in the heat of anger, then it affects the regard with which the relationship is viewed by the parties, especially the wife, the subject of the repudiation. The mere threat or fear of divorce causes many wives to leave their husbands.

On the other hand, judicial divorce at the instance of a Moslem wife is difficult to achieve in Nigeria. Anderson notes that the vast majority of divorces in Northern Nigeria are at the instance of the wife.[2] This is because the wife cannot obtain a divorce without the consent of her husband, unless she obtains it in court. Men often exhibit a "dog in the manger"attitude, and cases are not infrequently found where a husband who does not really want

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1. See Cohen, Dominance and Defiance, op.cit.

2. See Anderson, Islamic Law in Africa, op.cit., p.209: Greater frequency of divorce by wives is also a feature of marriage under customary law, and of marriage under the Nigerian Marriage Act; see further, Chapters VIII and X respectively.

his wife, nevertheless refuses to grant her a divorce, or imposes such terms as he knows she is unable to fulfil.

Fyzee observes that

> "greater suffering is engendered by the husband's withholding a divorce than by his irresponsible exercise of this right. Under such conditions the power to release herself is the surest safeguard for the wife".[1]

A wife may be powerless to release herself from a distasteful marriage, as the case of Bukar Fantami v. Fanta Dambu[2] shows. The husband in this case claimed that his wife refused to return to his house. Asked the reason for her refusal, the wife simply said that she did not love him. Pressed further for the reason why she did not love him, the wife said "I hate him without any reason. It is my heart that hates him". She refused to swear that it was not another man who had seduced her, and that she was not being forced to leave her husband by her parents. She was vehement, however, that she would not go back to her husband's house, and offered to divorce him by the payment of money. Her guardian supported this offer. The court appointed two arbitrators each, for husband and wife, who agreed that the wife should pay ₦200.00 to the husband for the divorce. Out of this sum the Area Court took away the dowry (bride-price) of ₦100.00, representing the price of a cow and a calf which the husband had given to the wife at the time of the marriage (sadak). The court gave the remaining ₦100.00 to the husband and dissolved the marriage, since, said the Judge, "marriage will never be successful unless if there is love".

The husband appealed to the Upper Area Court, which ordered the wife to repay the entire ₦200.00 khuli to the husband, but confirmed the dissolution of the divorce. The husband further appealed to the Sharia Court of Appeal.

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1. Fyzee, op.cit., p.147.
2. [1977] Appeal No. SCA/CV/27/BO/76, unreported, Sharia Court of Appeal, Bornu State, Nigeria, 11 Jan. 1977. This case was translated from Kanuri, for the present writer, by Abrahim M. Bukar, former Registrar of the Sharia Court of Appeal, Maiduguri and his team. Thanks are hereby recorded to them and also to Mr. Segun Yerokun, Lecturer in Law, University of Maiduguri who organized the team.

Three Judges, including the Grand Kadi Alhaji Baba Kurr Imam, allowed the appeal, and ordered that the wife should stay for a period of three months before having conjugal relations with her husband if she had contracted another "marriage", but if not, then she should immediately return to her husband's house. The court refused to grant her a dissolution of the marriage.[1]

In Mallam Jidda of Gonamari v. Fatume Abu Sakki,[2] the husband alleged that the wife went out at random without his express permission, and did not do her domestic duties. The wife admitted that she had never starved for one day during the five and a half years of marriage to him, but she said she did not love him because he was too old. She refused to live with him any longer. The four arbitrators appointed by the court agreed that she should pay the husband ₦400.00, as the price of her divorce. The husband accepted the money, and the Court dissolved the marriage. The husband, however, later appealed to the Upper Area Court revoking his acceptance of the ₦400.00 payment on the ground that he had paid ₦886.00 dowry, and had committed no wrong. He argued that he was either entitled to his wife, or the refund of the entire dowry. The Upper Area Court held that there was substance in the appeal, since the only offence of the husband was his old age, "which by itself is not an offence per se". The court ordered repayment of the entire dowry of ₦886.00 by the wife.

In both of the above cases the husbands had committed no matrimonial offence considered sufficient to justify a divorce being granted to the wife. But the wife

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1. Compare the case of Jamila, the wife of Quais, who demanded separation from her husband on the ground that she did not like him. She stated that she did not find any fault with him on account of his morals or his religion. She just did not like him. The case was heard by the Holy Prophet Muhammad himself who granted Khula on condition that she should return the orchard received from the husband as dower, see Rafiq op.cit., p.13.
2. [1976] Suit No. BUAC/CVA/284/76, unreported, Bornu Upper Area Court, Maiduguri, Nigeria - translated by Ibrahim M. Bukar, see above, p.78,n.3.

may be denied a divorce even in cases where she alleges and proves the commission of a matrimonial offence by her husband. This fact is illustrated by the case of Jummai Muhammadu v. Alhaji Dan Binta.[1] In this case the wife sought a divorce on the grounds of

(a) physical cruelty of the husband which resulted in her deafness;
(b) insufficient food;
(c) the insulting language used by her husband of her parents;
(d) ill-health which she suffered whenever she had sexual intercourse with her husband, and which often left her ill for a week afterwards, and in need of medical assistance;
(e) confiscation by the husband of all property he had given her whenever they had a fight.

The wife swore to the truth of all five grounds. The Area Court dissolved the marriage without awarding any payment to the husband, because of the fact that he had ill-treated the wife. The Court ordered the husband to refund the ₦1,500 which the wife paid him as kulle before she instituted the divorce action. The case had a chequered career, but finally, the Sharia Court of Appeal ordered the wife to pay ₦800.00 to the husband, and confirmed the divorce granted by the lower court. In other words, in spite of all her complaints against the husband she had to pay to be divorced from him.

These cases illustrate the fact that, whether the husband is at fault or not, the wife may be asked to pay him kulle, usually the dowry, plus expenses he incurred on the occasion of the marriage, while if she is at fault or she alleges no fault against the husband she may be refused a

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1. [1977] Suit No. SCA/CV/53/BO/76, unreported, Sharia Court of Appeal, Borno State, Nigeria, 29 March, 1977, - translated by Ibrahim M. Bukar, see above p.99.

divorce.[1] A husband's old age may not be regarded as a matrimonial offence in law, but in the opinion of a young wife it may be a grave fault, since it may affect the performance of the husband's marital duty.

Maliki law recognizes the right of a wife to the dissolution of a marriage on the grounds of:-

(a) physical or mental disease which would jeopardise the wife's health if the marriage continues;
(b) failure to maintain;
(c) desertion; and
(d) a residual ground (darar: prejudice) which includes the husband's mental cruelty, and also covers cases where the marriage has demonstrably broken down.

But a wife who claims a divorce on any of these grounds has to prove, by reliable, legally qualified Moslem witnesses, the truth of her statements, and this may prove difficult in practice, since the evidence of women is not accepted for this purpose. If she has no valid grounds for divorce, she is forced to pay huge sums of money to regain her freedom, sums which may be beyond her means, since the sadak given by the husband at the time of the marriage, although in law her own,[2] may have been in fact consumed by her parents. The position is aggravated if she has been kept in seclusion, since she would have had little opportunity to earn money of her own, or less ability to do so.

Yahaya Muhammad notes that, despite the divorce and the general disapproval of divorce, there is as yet nothing concrete which the authorities of the Northern States have done to limit the unnecessary occurrence of

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1. See also Abdu Bafillace v. Rabi, [1961] Suit No. SCA/CV17) 1961, unreported, Sharia Court of Appeal, in which it was held that the trial court had no power to impose a divorce on a husband upon payment of kulle by the wife. The Court reversed the decision of the trial court granting a divorce to the wife upon payment of kulle by her to the husband, although she was unable to prove any of the established g rounds of divorce, see Isa Shani, op.cit., p.45.
2. See further, above, pp.56-57.

divorce, by restricting the scope of its operation.[1] Anderson correctly states that the stability of marriage should be safeguarded in any practicable way, but he also pertinently urges that

> "what is sauce for the goose is sauce for the gander, so while a husband can divorce his wife at any moment and for any (or no) reason, it is difficult to speak convincingly about the sanctity, or stability of marriage; and it seems highly dubious how far it is wise for the Sharia Court of Appeal to attempt to override the customary law which prevails throughout the whole of West Africa".[2]

Refusal to grant divorce to women unless their husbands consent, or making it difficult for women to divorce unwanted husbands, is not the solution to marital instability, as the above statistics show. At present, in the Northern Islamic Emirates, the cards are all stacked against a woman divorcing her husband without his consent, yet women leave their husbands at a remarkable rate, whether they are divorced or not. They either set up in illicit cohabitation with a paramour, or indulge in outright prostitution, with disastrous consequences for the welfare of any children of the marriage. This illustrates the inability of law to regulate the practice of a community, and the wide divergence which could exist between the theory of law, and the actual practice of the community. The law lags considerably behind the practice of the community in respect to divorce of women.

B. Dissolution by death

C. (1) The effect of death on marriage

The death of the husband or the wife operates in law as a dissolution of the marriage.

A widow has an obligation to mourn for her husband.

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1. See Yahaya Muhammad, op.cit., p.36.

2. Anderson, "Islamic Law in Africa; Problems of Today and Tomorrow", in Changing Law in Developing Countries, edit. by J.N.D. Anderson, op.cit., p.174.

She may not, according to classical Islamic law, adorn herself with jewellery, khol [cosmetic], or any other means. She should wear only black, and avoid all perfumes or scented oil. The period of mourning varies among the various schools, but is not less than four months, and ten days which is the idda required for a non-pregnant woman.[1]

In the Northern States, however, custom seemed to have triumphed over Islamic law, and stringent morning observances are imposed on widows. Like a widow under customary law, the Moslem widow cannot bathe, nor change her clothes, comb her hair, or in any other way make herself attractive to other men. Interviewees in Maiduguri say that failure to observe the stipulated periods of mourning, which vary according to the circumstances, or to behave in the required manner, earns for the widow the hostility of the community, who may even accuse her of causing her husband's death.

The important legal difference is, however, that inheritance of a wife is not permitted by Islamic law. The Koran expressly forbids men from marrying their fathers' wives.[2] After the mourning period the wife is free to dispose of herself as she desires, and she inherits a portion of her husband's property, real and personal. This aspect of law is dealt with in greater detail in the chapter dealing with property rights and succession to property, but it may be noted here that Islamic law in this respect, is more favourable to women than customary law. Unfortunately for Nigerian Moslem women, as is shown later, customary law is widely applied to matters of property in the Northern States.[3]

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1. See Russell and Suhrawardy, First Steps in Muslim Jurisprudence, op.cit., p.41, pars. 135-138. See also, Cohen, Dominance and Defiance, op.cit., p.115.
2. Rodwell, The Koran, op.cit., Sura 4, werse 26, p.413. There is no legal bar preventing other relatives of the deceased husband from marrying the widow, see Jung, op.cit., p. xxvii.
3. See further, Chapter XII, p. 368 and Chapter XIII, pp.449-451.

(11) The practice of Idda (t)

Idda literally means counting and in Islamic Law it is the time during which a wife must wait, after the dissolution of her marriage, whether by death or divorce, before she can contract another valid marriage. The marriage must have been consummated in fact or in law[1] and the period varies according to the circumstances.

The idda of a pregnant woman lasts until her delivery. For a non-pregnant widow the period is four months and ten days. In all other cases the term is three periods of purity, (tohur) or if the wife does not menstruate, for example, a very young girl, or a menopausal woman, three months.[2]

The reason for the imposition of idda on a wife is mainly to ascertain, with some degree of certainty, the paternity of a child born to the wife after the termination of the marriage, whether by divorce or death. Another reason is the opportunity it gives for reconciliation between the parties, as a revocable divorce can be revoked by the husband before the idda of the wife is ended. Since a woman's marriage may be ended without her knowledge, she may observe idda without her knowledge.[3]

According to Maliki law, a repudiated wife should lead a retired life while keeping the idda. She may not change her residence without a good reason, and must be maintained by her husband, although the idda of a widow is at her own expense. If a woman remarries to another husband during the period of her idda, the marriage is void (batil) and any children born within six months of the divorce are affiliated to the divorced husband.[4]

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1. See Abdur Rahim, op.cit.,p.341.
2. See Ruxton, op.cit.,pp.141-143; Ameer Ali, op.cit.,pp.499-500; Abdur Rahim, op.cit.,p.341; Rodwell, The Koran, op.cit., Sura 2, verse 229.
3. See Ameer Ali, op.cit.,p.499.
4. See Ruxton, op.cit.,pp.142-143; See also Joseph Schacht, "Foreign Elements in Ancient Islamic Law", Journal of Comparative Legislation and International Law, Third Series, Vol.XXXII, Parts III and IV, pp.9-17.

Although idda is not entirely unknown to customary law[1] it is not frequently found in customary systems of law and thus provides an interesting contrast with customary law, where in most systems, all children conceived after the repayment of the dowry are not legally affiliated to the divorced husband.

7. Conclusion and Recommendations

A. Summary and conclusion

The legal status of women in Islam has been the subject of much controversy. Moslem as well as non-Moslem writers have made conflicting claims as to the status accorded by Islamic law to women.[2] Thus, Ma'aji Isa Shani asserts "that Islam proclaimed that men and women, by virtue of their humanity, were the equal of each other and when they lived together, just as man had certain rights over woman, so had woman rights over man".[3] Similarly, Muhammad Yahaya says that from "the beginning of Islam down to the present time her position has been one of honour in the eyes of the law",[4] and Ameer Ali, writing as late as 1880, pointed out that under the Islamic laws a woman occupies a superior legal position to that of her English sister.[5]

Contrary to these sentiments, Muir is not convinced that the institutions of Muhammed have tended to elevate and improve the status of women, for he says that in Islam:

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1. In Igbirra customary law a divorced woman cannot remarry within ten months of a divorce. If she does so any child born of the new union belongs to the divorced husband, see Mariyama v. Sadiku Ejo [1961] N.R.N.L.R. 81 and above, Chapter II, p.185.
2. See Ameer Ali, (Syed), The Legal Position of Women in Islam, op.cit.; also Rafiq, The Status of Women in Islam, op.cit.; Ameer Ali, Mahommedan Law, op.cit., pp.15-16; Levy op.cit., p.91-134; Fitzgerald, op.cit.,p.34; Coulson, A History of Islamic Laws, op.cit., pp.14-15; Guillaume, op.cit., pp.71-72.
4. Muhammad Yahaya, op.cit.,p.32.
5. See Ameer Ali, The Legal Position of Muslim Women, op.cit., p.16; Rafiq, op.cit., p.6.

3 Ma'aji Isa Shani, op. cit.

> "the condition of a woman is that of a dependant, destined for the service of her lord, liable to be cast off without the assignment of any reason and without the notice of a single hour...Thus restrained and secluded, liable at the caprice or passion of the moment to be turned adrift, it would be hard to say that the position of a wife was improved by the Code of Mahomet. Indeed, it may be doubted whether she was not possessed of more freedom, and exercised a healthier and more legitimate influence under the pre-existing institutions of Arabia".[1]

It would be futile to pretend that there is equality between the sexes in Islamic law. The laws of divorce, the toleration, if not encouragement of polygyny and concubinage, but not of polyandry, and the rules of succession, whereby a man is given twice the share of his sister, are only a few of the inequalities in Islamic law which negative any such assertion. Nawaz correctly says:

> "As to equality between the sexes, Islamic law rules are rather notorious. True, Islamic law considerably improved the position of women, but it did not advocate equality between the sexes. On the contrary, the position of women, whether in respect to social or property rights is far inferior to that of man".[2]

"It is true", says Rahman, "that Islam, in theory, gives a certain status to the woman but, in actual practice, she is much inferior to man, and economically, a virtual slave of the latter".[3] In fact the superiority of the male sex is enshrined in the Koran itself.[4]

In spite of the unequal position of women in Islamic law, however, it would be unrealistic to ignore the fact that Muhammad made genuine attempts to alleviate

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1. Muir, Life of Mohamet, op.cit.,pp.324-325; see also Mazhar ul Haq Khan, Purdah and Polygany, op.cit., p.195: "Among all the civilizations of the modern World, the Muslim has suppressed them [women] most. It is due to the institutions of purdah and polygamy and the ideology behind them.

2. M.K. Nawaz, "The Concepts of Human Rights in Islamic Law", Howard Law Journal, Vol.II, Spring, 1965, p.325 at p.328.

3. Munibur Rahman,"Movement for the Emancipation of Women in Persia", Bulletin of the Institute of Islamic Studies, No. 1, 1957, pp.26-39, at p.26.

4. Rodwell, The Koran, Sura IV, verse 38; see also Woodsmall, Moslem Women Enter a New World (New York: Round Table Press, 1936), p.375.

the legal iniquities imposed on women in many respects. His reforms of the traditional Arabic customs must be viewed in the light of the contemporary societies of his day. Today, his reforms may fall short of perfection, and compare unfavourably with the legal status of women as propounded by the different organs of the United Nations, but at the time they were initiated by the Prophet, they must have been revolutionary.[1]

Comparatively speaking, Islamic law as propounded in the Koran, and the theoretical writings of the classical jurists, is generally favourable to women. But unfortunately, there is a wide gulf between theory and actual practice. The laws which rule the lives of the Moslem peoples have never been co-extensive with pure Islamic law, although this last has always formed an important ingredient of them. Schacht says:

> "We must think of the relationship of theory and practice in Islamic law not as a clear division of spheres but as one of interaction and mutual interference, a relationship in which the theory showed a great assimilating power, the power of imposing its spiritual ascendancy even when it could not control the material conditions".[2]

Robinson notes that this dichotomy of theory and practice is observable "nowhere more so than in the Central Soudan".[3] This statement, although made in 1896, remains basically true today, in reference to the practice of Islamic law in the Moslem areas of Northern Nigeria.

The aim of this work is not to ascertain the theoretical legal status of women, but to provide evidence of the legal rights and obligations actually accorded to women in marriage and family life, and it is in this sense

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1. See Rafiq, op.cit., pp.6-7.
2. Schacht, Introduction to Islamic Law, op.cit.,p.84. See also "Islamic Law and Customary Law in French North Africa," Journal of Comp. and Int. Law, Third Series Vol. XXXII, Parts III and IV, pp.57-65 at p.59.
3. See Charles Henry Robinson, Hausaland: or Fifteen Hundred Miles through the Central Soudan, op.cit., p. 192.

that the legal status of women in Islamic law must be evaluated. Islamic law has infiltrated the customary law and become fused therewith, but it has been seen that in a number of important points, even in the most conservative Islamic areas of the Northern States, customary law has continued to prevail over the pure Maliki doctrine.

Consequently, the factors which serve as indices of the low legal position of women in customary law marriage are all present, and for the most part intensified among the Moslem community.

Thus polygamy, which made sense in an earlier stage of human development, but which is now regarded as offensive to civilized conscience in most modern communities, (Moslem communities not excepted),[1] flourishes to a much greater extent in the North than it does in Southern Nigeria. The pressure of progressive public opinion against polygamy, due to the influence of modern education, and the exposure to modern ideas through Western contact, which may act as an effective factor in reducing the practice, is totally absent. An educated wife precludes the idea of polygamy. Education among Moslem women in the North is sadly deficient.[2]

Similarly, the twin evils of child-marriage and forced marriages are more prevalent in the Moslem areas than they are in the South. Arbitrary divorce by husbands does not aid marital stability. Indiscriminate divorce is the rule rather than the exception among Northern Moslems. Consequently, marital instability is extraordinarily high, and the main casualties are the children of the marriage.

The practice of purdah is considered prestigious, yet it has been established that purdah system robs its practitioners, not only of physical but of mental vitality. Mazhar ul Haq Khan writes of the unfavourable

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1. See Anderson, Law Reform in the Muslim World, op.cit., pp.59-64, et al.

2. See above, Chapter I, p.117.

conditions in which purdah girls live and grow up. He says:

> They soon begin to suffer in body, mind, health and vitality. Naturally, the incidence of ill-health and disease is much greater among purdah women than among men. They are, therefore, less healthier, and live shorter lives, as they have lesser chances of survival in times of ill-health and disease than their men folk due to their lowered vitality.
>
> Some of their bodily troubles are specially caused by the Purdah system, such as osteomalacia, or the gross deformity of bones, especially of the pelvis, due to malfunctioning of calcium metabolism, caused by lack of sunlight and open air...."[1]

Similarly Vaughan, who worked as a doctor in a hospital in Kashmir, writes of purdah:

> "This miserable state of affairs, all too common in the East, whereby the woman is to all intents and purposes a prisoner in her own home, leads to gross pelvis deformity, rendering the birth of children difficult, and unnecessarily dangerous, if not impossible, and can be prevented by providing her with light".[2]

The impact of the purdah system as an obstacle to effective female education and the active participation of women in public life is too obvious to need further emphasis.[3]

B. Recommendations

Islam as practised in Northern Nigeria calls for modernisation. A change in social circumstances

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1. Mazhar ul Haq Khan, Purdah and Polygamy: A Study in Social Pathology of the Muslim Society, op.cit.,pp.77-78.
2. Kathleen Olga Vaughan, The Purdah System and its effects on Motherhood, (Cambridge, 1928), pp.37-38.
3. See Report of the Commission Appointed to Enquire into the Fears of Minorities and the Means of Allaying them, op.cit., p.59, where it is stated that the non-Moslem communities in Northern Nigeria expressed fears that the system of purdah "would be extended and made compulsory".

provides an adequate justification for a change in the law. Urgent progressive reforms are necessary, especially in relation to the laws of divorce, child-marriage, forced marriages and the purdah system. Universal compulsory education for girls, which is necessary in order to safeguard the effectiveness of the legal reforms, is also urgently necessary.[1]

The whole of the Sharia is regarded as based on divine revelation, and this is particularly true of family relations. Provisions in the Koran relating to marriage and family life are more abundant and explicit than in any other sphere of life.[2] Moslem rulers were therefore unwilling to forsake or amend the Sharia. But from 1915 onwards, the "wind of change" has blown across the Moslem world, and revolutionary changes have been made in marriage and family law. Recently the wind has changed into a gale and there is hardly any aspect of Islamic family law that has been left untouched. Some of the reforms include polygamy, the minimum age of marriage, consent to marriage, registration of marriages, and the laws relating to divorce and succession.[3]

A significant feature of these reforms is that in the majority of cases they were promulgated by an executive or legislature which was predominantly Moslem. Nigerian Moslem leaders, therefore, have no valid justification for the failure to effect family law reforms either in theory or in practice. The need for reform is recognized, and various aspects of the law which need reform has received attention from Northern Moslem writers, but so far nothing has been done.

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1. See P. Thomas, Indian Women Through the Ages (Bombay, Asia Publishing House, 1964), pp.315-36; the abolition of child-marriage in India was a crucial factor in opening up the alternative of education to the female child.
2. See Anderson, Law Reform in the Muslim World, op.cit., p.38.
3. Ibid.,pp.100-162; see also Coulson, Succession in the Muslim World, op.cit.,pp.13-28; Munibar Rahman, Movement for the Emancipation of women in Persia, op.cit., pp.26-39.

CHAPTER X

THE STATUS OF WOMEN IN STATUTORY MARRIAGE

1. Introduction

In contradistinction to the introduction of Islamic law, the introduction into Nigeria of English law and monogamous marriage revolutionized the laws of marriage and family life in Nigeria. It is a little less than a century since the first statute regulating the formation of a monogamous marriage was introduced into Nigeria. What has been its effect on the legal status of Nigerian women?

It has been seen that the number of marriages contracted under the Nigerian Marriage Act is relatively few in contrast to the number of marriages contracted under customary or Islamic laws.[1] But the impact made on women's status by the introduction of English laws cannot be judged solely by a statistical criterion. Although English marriage laws are confined to marriages contracted under the Nigerian Marriage Act,[2] and to marriages celebrated elsewhere which are recognized as valid monogamous marriages in Nigeria, their impact has a more far-reaching effect.

Until the introduction of English law and statutory marriage, Nigerian societies were characterized by male predominance, and in the eyes of the law the status of women was subordinate to that of men. It has been seen in previous chapters that in both customary and Islamic law marriages, in traditional society, the husband is the authoritative head of the family, with extensive powers over the person and property of his wife. Many legal rights given to the husband - for example, the practice of polygamy - are denied to the wife in nearly all Nigerian

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1. See further, Chapter II, p.175.
2. Cap 115, Laws of the Federation of Nigeria, 1958 Revision.

societies. In many societies the wife is legally in the custody of her husband.

The legal supremacy of the Nigerian husband was unassailed until, with the introduction of English law, some measure of equality between husband and wife was also introduced. The principle of equality of rights and duties between husband and wife removed many of the legal disabilities to which women were subjected under customary and Islamic law marriages. The favourable position accorded to women under English laws has imperceptibly pervaded the spirit and practice of customary law. Many of the innovations observed in modern customary law - for example, the wife's right to maintenance by her husband[1] - can be indirectly traced to the introduction of western ideas and English law. The introduction of English law has affected, not only the practice of the people, but also judicial and legislative attitudes. In this respect, the introduction of English law has had a greater impact on the legal status of Nigerian women than is evident from the relatively small minority of women whom it affects directly.

The laws which govern the celebration, validity, and incidents of monogamous marriage herein referred to as "statutory" marriage are found mainly in the Nigerian Marriage Act, 1914,[2] the Matrimonial Causes Decree, 1970[3] and the common law, equity and relevant statutes of general application received into Nigeria.[4]

As previously noted, under the Republican constitution of Nigeria 1963,[5] as well as under the Constitution of the Federal Republic of Nigeria, 1979, the Federal Government has exclusive legislative jurisdiction in all

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1. See further, above, Chapter VII, pp.589, and below Chapter XII.
2. Cap 115, Laws of the Federation of Nigeria, 1958 Revision.
3. Decree No. 18 of 1970.
4. See above, Chapter II, pp. 193-196.
5. Section 69, item 23 of the Schedule, Part I Exclusive Legislative List; see also Babalola v. Babalola [1974] N.M.L.R. 55.

matters relating to the "formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial causes relating thereto".[1]

The present chapter gives a brief account of the historical antecedents of the Marriage Act and the Matrimonial Causes Decree, 1970.

The history of a statute, although usually ignored by lawyers, very often reveals the reasons which prompted its enactment, and the social, economic, or political policy inherent in its provisions. Such knowledge leads in turn to a greater understanding of the statute which may create an empathy between the interpreters and the promulgators, which, eventually may result in a more harmonious interpretation of the statute.

The historical antecedents of a statute embraces not only the parliamentary debates, but, and this is especially relevant in the colonial context, the various confidential reports, observations, letters of advice, criticisms and instructions contained in dispatches which were necessarily transmitted between the officials in the Colonial Office in London, and the administrative officers in the colony. Very often, the history of a statute reveals that it is the brainchild of a single administrator bent on imposing his social policy on the local inhabitants, regardless of the social reality in which the statute is forced to operate. The reaction of the people to the particular piece of legislation may, in such a case be very important in an assessment of the statute, and may explain the effectiveness or otherwise of its provisions.

The history of the statute is particularly pertinent in the case of the Nigerian Marriage Act. This statute had a chequered career before it eventually reached the statute books, has been the subject of bitter

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1. Sections 4(2) - 4(5); item 58, Second Schedule, Part I, Exclusive Legislative List, Constitution of the Federal Republic of Nigeria, 1979.

controversy and criticism since then, and, as shall be seen shortly, has produced conflicts in its interpretation and application, many of which are not yet resolved.

Some of the conflicts produced by the introduction of statutory marriage into Nigeria will be spotlighted here.

The primary aim of this, and the next chapter, however, is to examine the extent to which the laws of statutory marriage are similar to, or vary from, those of customary and Islamic law marriages, and to consider the effect in real terms of some of the innovations on the legal status of women in marriage. In pursuance of this aim, on most of the topics discussed in these two chapters, especially in relation to the formation, incidents and dissolution of marriage, attention will mainly be focussed on areas of significant change in the law.

The topics discussed in this chapter are centred on the history and formation of statutory marriage, while the incidents and dissolution of the marriage are postponed for discussion in Chapter XI.

HISTORY AND NATURE OF STATUTORY MARRIAGE

A. The Historical Background

(1) Introduction

The earliest statutory provision relating to marriage in Nigeria was the Marriage Ordinance 1863,[1] which provided for "the granting of licences for marriage in the Settlement of Lagos and its dependencies".[2] The Registration Ordinance, providing for registration of births, deaths and

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1. Ordinance No. 10, Lagos, 1863.
2. The Lagos dependencies were territories near or adjacent to Lagos not extending further to the westward than the second degree of east longitude - see C.0.879/20, Dispatch No. 441, dated 18th Sept. 1882, p.208.

marriages, was also enacted in 1863.[1] But the first legislation regulating the form of marriage, and the manner in which it is celebrated, was the Marriage Ordinance, enacted on 19 November, 1884.[2] This Ordinance repealed all existing Ordinances relating to marriage, and extended to the whole of the Gold Coast Colony and the protected territories.[3] In 1886, Lagos was separated from the Gold Coast Colony,[4] but the Marriage Ordinance 1884 continued to apply to Lagos.

None of the above Ordinances applied to the Protectorates of Northern or Southern Nigeria, but in 1900[5] and 1907,[6] Marriage Proclamations were enacted for the Protectorates of Southern and Northern Nigeria, respectively. These Proclamations contained provisions similar to those of the Marriage Ordinance 1884. When the Protectorate of Southern Nigeria and the Colony of Lagos were merged in 1906 to form Southern Nigeria,[7] the Proclamation of 1900, which had applied to the Protectorate of Southern Nigeria was repealed, and the Marriage Ordinance 1884 applied to the new entity, Southern Nigeria. Finally, in 1914, on the merger of Northern and Southern Nigeria, the Marriage Ordinance 1914[8] was enacted. This statute repealed all

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1. Ordinance No. 21, Lagos, 1863, enacted on the 18th October, 1863.
2. No. 14 of 1884.
3. The Ordinances repealed were Ordinance No.10 of 1863, No.21 of 1863 "as relates to the registration or solemnization of marriages, and any Ordinance or part of any Ordinance now in force relating to the solemnization or registration of marriages within the Colony". - see S.1 Marriage Ordinance, 1884.
4. See further, above, Chapter I, pp.70-78.
5. Marriage Proclamation, 1900. For the history of this proclamation see H.F. Morris, "The Development of Statutory Marriage Law in 20th Century British Colonial Africa", in the forthcoming issue of Journal of African Law, [1979].
6. Marriage Proclamation, 1907, No.1 of 1907, Laws of the Protectorate of Northern Nigeria.
7. See above, Chapter I, p. 75.
8. No. 18 of 1914. This statute repealed the Marriage Ordinance 1908, the Marriage Proclamation 1907, and the Foreign Marriage Ordinance 1913.

previous marriage Ordinances and Proclamations, and applied throughout Nigeria. The 1914 statute, with minor amendments, and renamed the Marriage Act, continues to regulate the celebration and validity of marriages in Nigeria. Its provisions are substantially similar to those of the Marriage Ordinance 1884. A brief discussion of the history of this important legislation would therefore help to clarify the issues in the subsequent analysis of some of the more important provisions of the present Nigerian Marriage Act.[1]

(11) The Marriage Ordinance, 1884[2]

Parr[3] suggests that African statutory marriage laws were enacted out of deference to the wishes of the early Christian Missions, who were hostile to certain features of customary law marriages, such as the practice of polygamy, widow inheritance and the payment of dowry. These Missions, it is alleged, were generally unable to enforce their religious ideas of marriage on the native population by mere persuasion, and needed the authority of the Government, in the forms of laws, to enable them to effect their purpose.[4]

It is an undeniable fact that the Missionaries generally disapproved of African customary law marriage, especially in its treatment of women, and the low position to which wives were relegated in marriage and family life. But it is also a fact that the Marriage Ordinance, 1884, was not initiated by the Missionaries for the purpose of imposing the English monogamous form of marriage on the population, nor, in fact, did they approve of some of the provisions of the statute when it was finally enacted.[5]

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1. Cap 115, Laws of the Federation of Nigeria, 1958 Revision, retitled "Act" in accordance with the Designation of Ordinances Act, 1961, No. 57 of 1961, Laws of the Federation of Nigeria, s.2(1). See further, Chapter I, p.58, n.4.
2. No. 14 of 1884.
3. See Martin Parr, "Marriage Ordinances for Africans", 27 Africa, 1947, pp.1-7; Dorothy Dee Vellenga, "Attempts to Change the Marriage Laws in Ghana and the Ivory Coast" in Ghana and the Ivory Coast: Perspectives on Modernization edit. by Philip Foster and Aristide Zolberg, op.cit., pp.125-150 at p.134.
4. See Kasunmu and Salacuse, Nigerian Family Law, op.cit., p.49.

footnote 5 continued.....

For example, most Missions wanted the marriage age at which parental consents are required for a marriage under the statute to be fifteen to eighteen years, especially for women, instead of the twenty-one years for both spouses, which was finally enacted.[1]

The Marriage Ordinance, 1884,[2] originated as a direct result of a letter written by Mr. Buhl of the Basle Missionary Society to Governor Lees, requesting him to certify as lawful, marriages celebrated between German subjects in the Gold Coast. These marriages were celebrated "according to English law, viz., according to the law of the Gold Coast Colony"[3], and certification was necessary, in order for the marriages to be recognized as legal in Germany.

Mr. Buhl's letter was sent by Governor Lees to Acting Chief Justice Jackson for his comments. Justice Jackson noted that banns had been published and marriages solemnized by ministers of the different Christian sects, but he was of the opinion that valid legal marriages could only be solemnized in the Gold Coast Colony by a priest in Holy Orders of the Church of England. It was therefore necessary to make provisions for the solemnization of marriages by Ordinance under which all marriages celebrated by the churches would be legally valid. He stated his opinion thus:

> "Native law of marriage there is not. The conception of marriage is utterly unknown to that law. The native contract euphemistically translated as 'marriage' is utterly different from marriage.
>
> This being so, and it being also true that the English law here is to be sought entirely on the Ordinances passed by that legislative authority which has been acquired by the Government, it is

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Footnote 5 continued..... See Philips, Survey of African Marriage, pp.412-413, for the viewpoints of the Missions on statutory marriages in Nigeria; see below, pp 146-147.

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1. See e.g. the letter dated 26 March, 1879 from Rev. P. Lonapre, of the Roman Catholic Mission Lagos, suggesting 17 years for women, and the letter of Rev. F. Buhl of the Basle Missionary Society, dated 25 April, 1879 suggesting 18 years - C.0.879/20-216, p.30. See further below, pp.170-171.
2. No. 14 of 1884.

footnote 3 continued.....

necessary to observe that there is not any special marriage ordinance".[1]

The recommendations of Justice Jackson were sent by the Colonial Office to Sir Chalmers, who agreed that there was a sufficient reason for passing an Ordinance providing definitely for the legal constitution of marriages "where either of the parties professes the Christian religion", and for the registration of such marriages.[2]

He recommended that an Ordinance following the principles and, in most respects, the details of the Hong Kong Ordinance, with such modifications as may be requisite to adapt its provisions to local circumstances, would be appropriate.[3]

The recommendations of Chalmers, as well as copies of the Hong Kong and Ceylon Marriage Ordinance, were forwarded by Sir Michael Hicks Beach, Secretary of State, to the Governor of the Gold Coast with instructions that a draft Ordinance for the Colony should be prepared by Justice Jackson, and forwarded to him (Beach) for consideration.[4]

It is therefore clear that the Marriage Ordinance was a direct response to the need to provide legal machinery for marriages of Europeans in the Gold Coast Colony, and in the drafting period, there is little evidence of ouvert pressure by Missionaries to influence its provisions, although their presence behind the scenes cannot be entirely ruled out.

From its drafting stage, the Ordinance attracted a great deal of adverse criticism which has continued throughout the century of its existence. Initiated in 1879, it had a turbulent career, before it was finally enacted on the 19th of November, 1884. Four drafts were prepared, three of them by eminent lawyers, but each draft was criticized as not being suitable, by one sector of the community, or the

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Footnote 3 continued.....

3. See dispatch No. 203, dated 12th October, 1878, enclosurel in No. 1, dated July 29, 1878, C.0.879/20-201.

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1. Ibid.,See enclosure 2 in No. 1, p.202.
2. No.3, dated 5 December, 1878, pp.202-203.
3. Ibid., p.203.
4. C.O. 879/20, p.203, Dispatch No.190, dated 9 Jan. 1879.

other.

The first draft, prepared by Mr. Justice Jackson,[1] would have legalised only such marriages as were solemnized in a place of worship, thereby making marriage a purely religious affair. The relevant section of his draft provided:

> "No marriage shall be valid which would be null and void on the ground of kindred or affinity in England or Wales. A marriage shall be null and void if both parties knowingly and wilfully acquiesce in its solemnization in any place other than a licensed place of worship (except when authorised by special licence), or under a false name or names, or without publication of banns or licence duly issued or by a person not being a competent minister.
>
> But no marriage shall after celebration be deemed invalid, by reason that any provision of this ordinance other than the foregoing has not been complied with".[2]

In a letter accompanying the draft he explained his reasons for making such a proposal:

> "Regarding as I do marriage as the foundation of social progress, I think that care should be taken not to discourage it, and in my opinion the publication that the law regards it as a mere civil contract, and that the religious ceremony is not of its essence, would tend thereto by immediately quenching the enthusiasm kindled by the ministers. This is why I have changed the Pagan 'celebration' into the Christian 'solemnization'".[3]

The learned Justice conveniently forgot, that in 1879, the overwhelming majority of the Nigerian population,[4] and many of the Europeans, were non-Christians. He also forgot that marriage in English law, as well as in many other European countries, was a civil contract.[5]

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1. Ibid., Dispatch No. 441, dated 18 Sept. 1882, Enclosure 6, pp.210-211.
2. Ibid.
3. Ibid.,Dispatch, 441, dated 18 Sept. 1882, enclosure 5, dated 11 Feb. 1879, p.210.
4. See the letter Sir Samuel Rowe, K.C.M.G.sent to the Colonial Office, dated 1 August, 1882, explaining his reasons for introducing his own Marriage Ordinance Bill into the Legislative Council. C.O. 879/20. pp.206-207.
5. Ibid., See the comments of Robert Campbell in a letter written to the Acting Assistant Colonial Secretary, dated 3 March, 1879: "fully three-fourths of the population of Lagos are Mohammedans and pagans".

Two comments, representative of the general reaction to this proposal are reproduced here. The first, from a member of the native population of Lagos, Mr. J.H. Willoughby,[1] is produced in full in the appendix;[2] the other is a paragraph taken from the letter[3] of Mr. Alfred Maloney, Administrator of the Gold Coast:

> "African marriage is different to that which obtains among Christian communities. But notwithstanding the looseness of the tie, as understood among the natives, and however wanting in our estimation it may be in any attribute of sanctity, it is desirable that the action taken by the Government should not if possible be allowed to operate so as to render the tie even looser and less sacred than it is under present circumstances, and to convert, through ignorance or the ignoring social circumstances, a union looked upon in native estimate (although perhaps of not a high standard) with respect, from the position now occupied by it to the lower, even in their minds, one of concubinage which I believe it is considered already in a Christian sense, or may be worse, of prostitution. Whatever we do, our action, executive, or legislative, should elevate generally rather than degrade".[4]

More practical, but no less penetrating, was the criticism of Mr. Robert Campbell. He reminded the authorities that fully three-fourths of the population of Lagos were heathens and Mahomedans, both of whom observe some formality in engaging in marriage, but neither of whom solemnize it by means of religious rites or ceremonies in a church. He asked the pertinent question:

> "Will these then be considered by the law as unmarried and consequently acquitted of all obligations of parents for their progeny"?[5]

Lord Ussher, the Governor, no doubt actuated by these and other adverse criticisms of Justice Jackson's draft, asked Thomas Woodcock, Queen's Advocate, to prepare

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1. See C.O. 879/20, p.213 - Dispatch No. 441 dated 18 Sept. 1882, letter dated 8 Mar. 1879.
2. See Appendix I, below, p.123.
3. C.O. 879/20, p.208 - Dispatch 441, dated 18 Sept. letter dated 18 Sept. 1882.
4. Ibid.,pp.14-15.
5. See C.O. 879/20-212. p.23, Dispatch 441, 18 Sept. 1882, letter of 3 March, 1879.

an alternative draft. This latter draft, followed the Hong Kong Marriage Ordinance.[1] It differed from Justice Jackson's draft in that it gave the parties to a marriage the option of celebrating their marriage by a religious ceremony in a church, or by a civil ceremony before the registrar of a district.[2]

Governor Ussher died and was succeeded by Sir Samuel Rowe. The fate of the drafts prepared by both Justice Jackson and Mr. Woodcock, does not appear from the correspondence on the subject,[3] but in 1882, Sir Samuel Rowe prepared another draft marriage ordinance which actually received a first reading in the Legislative Council of the Gold Coast before it was withdrawn by order of the Colonial Office.[4] The highlights of this short Bill (reproduced below in Appendix 2),[5] were that it attempted to legalize all marriage celebrated in accordance with any Christian ritual. The Bill also provided:

> "the offspring of parents duly married in accordance with such Christian ritual shall be declared to be legitimate and entitled to all such rights in respect of succession to property, as if their parents had been married according to native law, any native customs or law to the contrary notwithstanding".[6]

This Bill was severely criticized by Chief Justice Marshall,[7] who had himself prepared a draft marriage ordinance in 1879. The Earl of Derby, then Secretary of State for the Colonies, who agreed with the criticisms of Justice Marshall, resuscitated Mr. Woodcock's draft, and

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1. Ibid.,Enclosure 14, p.33-42.
2. The Hong Kong Marriage Ordinance was based mainly on the Ceylon Marriage Ordinance. For the history of these Ordinances see Shirley Zabel, "The Legislative History of the Gold Coast and Nigerian Ordinances", 13 J.A.L.1969, No. 2, pp.64-79 and 158-178.
3. See C.0.879/20-223, p.45, Dispatch 122, 23 Mar. 1883.
4. Ibid., pp.6-7, Dispatch 200, 23 May, 1882, Enclosure No.9.
5. See below, pp.125-127.
6. C.0. 879/20-204, Dispatch 200, 23 May, 1882, Enclosure No. 9. See further below, Appendix 2, p
7. C.0. 879/20-205/206, pp.8-10, letter dated 6 July,1882.

amended it, by inserting provisions which invalidated the practice of polygamy in a marriage under the Ordinance.[1] He also made other amendments which will be noted in the appropriate sections. The draft thus amended was subsequently enacted as the Marriage Ordinance, 1884.[2]

APPENDIX 1

COMMENTS OF A CORRESPONDENT ON THE MARRIAGE ORDINANCE, 1884

Mr. J.H. Willoughby to the Acting Assistant Colonial Secretary.

"Marriage Ordinance"

Oko Olowogbowo, Lagos,
March 8, 1879.

Sir,

I am afraid I may be writing something foreign to the subject in question, for I see nothing provided for the natives of the Colony in the Bill of marriage for British subjects.

How far it is necessary for the Governor to have power to give or withdraw license for any church or chapel to marry, &c. I am not in a position to know. I only think that a Governor, being a "Nonconformist", or a "Churchman", or "Roman Catholic", and administering the government for the time being, and who may be illiberal in his views, may do great mischief against denominations other than his own by the power he seems to possess by the "Marriage Bill".

However, permit me to leave the above to those who know better the workings of "Marriage Ordinance" in civilised countries, I want much to write of Lagos native customs of marriage as may be affected by the laws of civilised England.

A new born baby girl is immediately espoused by a man, the consent of the mother is given, the man goes on contributing services of various kinds to the parents and friends until she be grown up, and when she becomes marriageable, she is given to this man, with whom she must perforce go, willing or not?

Two respective parents, from being old frients together, would cement the friendship by agreeing to marry the one, their daughter, to the son of the other, at the expense of the feelings of the children?

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1. Ibid., 223/224, Dispatch 122, 22 March, 1883. pp.45-47.

2. No. 14 of 1884.

A man gets to the property and belongings of his deceased relations, be those his father, mother, uncle, aunt, elder brother, &c., among these belongings, there are home-born girls, call them slaves or dependents as you please, the man takes and makes wives of them with or without their consent?

A man takes to himself a number of women whom he called his wives, he may get them with the respective consent of the parents and women themselves, which among these women is the wife in the English legal sense?

A man representing an ancient family dies intestate. Shall his properties go to his wife? She thereby impoverishes this ancient stock to enrich her own. Can a native wife, married after native customs, and being British subject, claim intestate properties as does a civilised married woman?

A man, be he civilised or not, gets a wife; in course of time, and from some causes or other they could not live together, they therefore agree to separate altogether and for ever. Shall this man take to him another wife? If so, which is legal, the first or second? Could the first have any claim at all on the husband from whom she thus separates herself?

A Mahomedan, a British subject, marries his four wives, with consent of respective parents of himself and wives, who are also British subjects; which is the wife in the legal sense? He also contracts other marriages by himself with other women, by paying to his priest a sixpence and some kola nuts for each woman respectively; are they legally called wives, which of them can claim intestate properties?

A father gets his daughters, and when they are grown up and marriageable he takes and gives them to any man he may think pleased to gratify, and like a goat he distributes them, despite the feelings of the daughters. This is prevalent with our Mahomedan fellow subjects under British rule. Is this right? A man, old or young, takes a young girl, before she gets to make her choice the man gets the consent of the parents to marry the young woman at his convenience; in the interval the mother keeps exacting and extorting services of various kinds from the man. In course of time, the mother, gets another richer man for her daughter, and desires her to refuse the usual address of the former man, who is denied her altogether. Is this right?

Wishing these few knotty country customs of marriage may get the legal consideration of our judges,

I beg, &c.

C.D. Turton, Esquire, (Signed) J.H. Willoughby.
Acting Colonial Secretary, Lagos.

APPENDIX II

MARRIAGE ORDINANCE BILL 1882

Gold Coast Colony.

In the forty-fifty year of the reign of Her Majesty Queen Victoria.

Sir Samuel Rowe, K.C.M.G., Governor.

[May, 1882]

Date. At a legislative Council held on the day of May, in the year of our Lord, One thousand eight hundred and eighty-two.

Title. An Ordinance to declare legal all Marriages solemnized in accordance with any Christian ritual, in the Gold Coast Colony.

Preamble. Whereas it is right and expedient that marriages solemnized in accordance with Christian ritual should be declared to be legal, and that the children born of such marriages should be declared to be legitmate;

Enacting clause. Be it therefore enacted by the Governor of the Gold Coast Colony, by and with the advice and consent of the Legislative Council thereof, as follows:-

Marriages in accordance with Christian ritual legal.

1. All marriages in accordance with any Christian ritual shall be declared to be legal, any native custom or law to the contrary notwithstanding.

Legitimacy of children of such marriages.

2. The offspring of parents duly married in accordance with such Christian ritual shall be declared to be legitimate and entitled to all such rights in respect of succession to property, as if their parents had been married according to native law, any native custom or law to the contrary notwithstanding.

Every minister shall be a registrar of marriages.

3. Every minister having the power according to the doctrine of his religion, to perform the ceremony of marriage in accordance with any Christian ritual shall be a marriage Registrar for the district in which he resides.

Declaration before marriage obligation.

4. Every such Minister before performing any marriage ceremony shall require from each party to such proposed marriage a declaration signed by each of them in the form given in Schedule A. of this Ordinance.

5. Any person knowingly and wilfully making any false statement in such declaration shall be liable to pay a penalty not exceeding fifty pounds, or in default thereof to be imprisoned and kept to hard labour for a period not exceeding six months. — Penalty for false statement in declaration.

6. Every marriage registrar so constituted by the third section of this Ordinance shall be required to register and certify according to the forms given in Schedule B. of this Ordinance every marriage performed by him. A copy of such certificate shall be signed by the registrar and handed to the parties to the marriage on payment of the fee of ; half of such fee shall be retained by the registrar and the other half shall be paid into the general revenue of the Colony. — Registrars to register and certify.

7. Every such registrar shall forward to the Colonial Secretary on the twelfth of January and on the twelfth of July in each year, returns of all marriages performed by him during the past half year. — Returns of marriages to be made to the Colonial Secretary.

8. Nothing in this Ordinance shall be construed to preclude any minister from charging such fees as he may have been accustomed to receive hertofore on performance of the ceremony of marriage. — Savings as to minister's fees.

9. This Ordinance may be cited as "The Marriage Ordinance, 1882". — Short title.

SCHEDULE A.

I do solemnly declare, that there is not any impediment of kindred or alliance or any other hindrance either according to English law or native law or custom, to my marriage with

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SCHEDULE B.

FORM OF REGISTRATION

Name	Condition	Rank or Profession.	Age	Dwelling or Place of Abode.
Husband	Bachelor or Widower.			
Wife	Spinster or Widow			

Schedule B. continued.....

SCHEDULE B. continued:

The parties above-mentioned were married by me on the day of , 188 .

Signed

Minister and Registrar.

Form of Certificate.

I certify that was duly married to by me on the day of in accordance with the ritual of the religion I profess.

Signed

Minister and Registrar.

B. The monogamous nature of the Marriage Act.

(1) Monogamy enshrined in the Marriage Act.

Marriage under the Marriage Act is monogamous. As previously seen,[1] a monogamous marriage, following Hyde v. Hyde,[2] is universally accepted by all common law countries, as "the voluntary union for life of one man and one woman to the exclusion of all others". The Interpretation Act, 1964,[3] however, recognizes the possibility of divorce, (relatively rare at the time of Hyde's case), and accordingly defines a monogamous marriage as:

> "a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage".

Enforced monogamy, hitherto an unknown feature of Nigerian marriage laws, is one of the most radical

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1. See above, Chapter III, p.204.

2. [1866] L.R.1 P. and D. 130, 133.

3. No. 1 of 1964, s.18, Laws of the Federation of Nigeria.

innovations introduced by the Marriage Act, and, while welcomed by the female members of the community, it has always been, and continues to be one of the provisions of the Act most resented by a large proportion of the male members of the Nigerian population. It would therefore be interesting to see how the prohibition of polygamy became enshrined in the Marriage Ordinance, 1884.[1]

Under the four drafts submitted by Justice Jackson, Mr. Woodcock, Chief Justice James Marshall, and Governor Rowe, polygamy was not specifically prohibited. In the draft prepared by Mr. Woodcock, if the marriage was celebrated before a registrar of marriages, the parties were told that if either of them contracted another marriage during the subsistence of the one they were presently contracting, he or she would be guilty of bigamy and liable to the punishment inflicted for that offence.[2] Nevertheless, the subsequent marriage, once celebrated, would have been valid, and in fact, the penalty of bigamy only attached to a subsequent marriage, and not to one contracted prior to the marriage under the Ordinance. A man, therefore, could contract several polygamous marriages before contracting a marriage under the Statute, without incurring any penalty for bigamy, and all the marriages would be legally valid.

There is no doubt that some[3] of the draughtsmen intended to prevent a polygamous marriage from being contracted under the Ordinance, but failed to see that their drafts would not legally enforce monogamy.[4] The express prohibition of polygamy, and the consequent invalidation of a statutory "marriage" during the subsistence of any prior

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1. No. 14 of 1884.
2. C.O. 879/20-217/222, pp.33-42. Dispatch No. 441, 18 Sept. 1882, enclosure No. 14, para.34.
3. Ibid.,para. 34.
4. See e.g. the Bill prepared by Governor Rowe, and introduced into the Legislative Council, which declared all "Christian marriages" as legally valid marriage.(Appdx.2) Polygamous marriages celebrated by the African "Christian" Churches would have been included under this provision. But see Oke v. Gansallo [1923] 4 N.L.R. 109 where it was held that an article stating that the tenets of the African Church were "pernicious" was not defamatory, on the ground that the African Church profess that polygamy is acceptable as a doctrine of a Christian Church.

marriage, was due to the legal perspicacity of the Earl of Derby, who discovered the lacuna, when he was amending Mr. Woodcock's draft. The Earl was of the opinion that the draft prepared by Mr. Woodcock and based upon the Hong Kong Marriage Ordinance of 1875, with certain modifications, would meet the requirements of the Colony.[1] After making some alterations to the draft, the Earl observed:

> "With the foregoing modifications, and, subject to such further alterations as may be thought desirable in respect of the points which I have referred for your consideration, the draft ordinance will, in my opinion, provide sufficiently for all marriages except those of natives, but to meet the requirements of natives who may desire to contract marriage under the ordinance, some further provisions are required".[2]

"These provisions should, I think, be based on the following propositions viz:-

> (1) A native between whom and any person a marriage valid by native law or custom is subsisting should not be allowed to marry under the ordinance any other person.
>
> (2) A native married under the ordinance should not be allowed during the continuance of that marriage to contract a marriage according to native law with any other person, but in all other respects the ordinance should not affect marriages according to native law and custom".[3]

These provisions are significant in that they

(a) affirmed the fact that a customary marriage could be legally valid after the enactment of the statute, and

(b) kept a rigid separation between customary marriage and marriage under the statute by (1) excluding a customary marriage from the incidents of a statutory marriage and (11) preventing parties from mixing a customary marriage with a statutory marriage, and vice versa, except where both marriages are between the same parties.

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1. See C.O. 879/20, Dispatch 122, 22 March, 1883.
2. Ibid.,section 18.
3. Ibid., ss. 19(1) and 19)2).

It should be noted that Lord Derby's proposition as stated above in paragraph 2 would not have prohibited persons married under the Act from marrying each other subsequently under customary law. The draughtsmen in Accra carried out these proposals faithfully, but when the draft of the 1884 Ordinance was sent to Lord Derby for his approval, he changed section 37 of the draft, i.e. para 2 above, and inserted the provision precluding persons married under the Act from contracting a subsequent customary marriage even with each other.[1] The result is that once a marriage under the Act has been celebrated, no subsequent customary marriage is possible whether the parties are the same, or not.

Section 35 of the Act[2] provides:

> "Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable, during the continuance of such marriage, of contracting a valid marriage under native law or custom,...."

The incapacity to contract a valid customary marriage subsequent to a marriage under the Act is not restricted by any words of limitation, and the prohibition is therefore absolute.[3] This provision has been described as discriminatory,[4] in view of the fact that persons married under customary law may, in addition, marry each other under the Act, but once they are married under the Act, no further marriage under customary law is legally possible.

Although the law was expressly changed by the noble Earl of Derby, he gave no reasons for the change. Kasunmu and Salacuse, commenting on section 35 of the Marriage Act, say that a possible reason for the absence of a provision permitting the conversion of a monogamous

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1. See C.O. 879/2 - 226/230, pp.50-59, Dispatch 216, 29 March, 1884, enclosure 1, draft Ordinance of 1884, and Dispatch 758, 5 Sept. 1884, p.62, para. 6, enclosure No. 188, s.37.

2. Marriage Act, 1914, Cap. 115, Laws of the Federation of Nigeria, 1958 Revision.

3. Compare s.33(1) of the Nigerian Marriage Act, 1914, Cap.115, Laws of the Federation of Nigeria, 1958 Revision.

4. See e.g. Kasunmu and Salacuse, Nigerian Family Law, op.cit. p.49; Nwogugu, "The Position of Women in the Changing Family Law in Nigeria," op.cit., p.101; D.A. Ijalaye, "Marriage Laws in Nigeria, Harmonisation or Unification", footnote contd.....

marriage to a polygamous one, is that the Marriage Act was passed for the purpose of encouraging monogamy which was thought to be superior to polygamy.[1]

It is difficult to see how the prohibition of a subsequent customary marriage after a statutory marriage between the same parties could encourage monogamy, since monogamy would have been already imposed on the parties by their statutory marriage, and any subsequent customary marriage between them, in the absence of an express provision allowing them to do so, would not have given the parties the right to marry anyone else under customary law. In other words, their marriage would remain a monogamous marriage, whether they contracted a subsequent customary marriage, or not.

To allow the parties to convert their monogamous marriage into a polygamous one as Tanzania's new marriage law[2] does discriminates against monogamous marriages, since a marriage which is polygamous in fact obviously cannot be converted into a monogamous marriage. Many of the allegations of discrimination against the Nigerian Marriage Act result from a failure to recognize that spouses of a marriage that is polygamous in fact cannot convert their marriage into a monogamous one under the Nigerian Marriage Act.

There is no evidence of an intention on the part of the colonial administrators to impose wholesale monogamy on the native population of the Gold Coast Colony. The intention of the Earl of Derby, the architect of the prohibition of polygamy in statutory marriage, may be gleaned from his answer to the objections of Governor Young to the 1884 Marriage Ordinance.

Footnote 4 continued..... Nigerian Bar Journal, Vol.XII, 1974, p.21 at p.24.

1. Kasunmu and Salacuse, op.cit.,p.49.

2. See Tanzania's Law of Marriage Act, 1971, Act No. 5 of 1971, s.11: A marriage under this Act may be converted by a joint voluntary declaration by a husband and wife before a court of law. A marriage between two Christians cannot be converted into a polygamous one as long as both spouses profess the Christian faith; see James S. Read, "A Milestone in the Interaction of Personal Laws: The New Law of Marriage and Divorce in Tanzania" [1927] 16 J.A.L. No.1, pp.19-39; Y.P.Ghai, "The New Marriage Law in Tanzania", 11 Africa Quarterly, 1971-72, pp.1.

Governor Young, had not read the draft of the Ordinance and he was of the opinion that the Marriage Ordinance 1884, would be imposed on all natives of the Gold Coast Colony. He considered this inadvisable, in view of the fact that little real progress had been made on the Gold Coast towards any substantial civilization. He was of the opinion that a "marriage law to meet the social requirements of Europeans in this Colony and of the small portion of the community which is civilized", was all that was necessary at that stage.[1]

Lord Derby's answer to these observations was stated thus:

> "...while I agree that it is not expedient to supplant the native laws and customs on those subjects by a law adapted to a civilized community, except in the case of those natives who prefer to bring themselves within the operation of the latter law by entering into the contract of marriage in accordance with its provisions, I consider that natives who thus accept the status of marriage recognized by civilized communities should be precluded from violating the contract by contracting polygamous marriages though sanctioned by native custom, and that their widows and children should enjoy the rights of succession ab intestato to their property which are recognized by the laws of civilized nations, and that to this extent the law may properly, as the proposed Ordinance will, interfere with native law. I do not suppose however, that any but Christian natives will contract marriages under the Ordinance".[2]

Thus, it was clearly envisaged that only Christian natives would marry under the Ordinance, and since all established Christian Churches at that time forbade the practice of polygamy among their members,[3] the prohibition of polygamy would entail no additional hardships.

Lord Derby's proposals were incorporated into

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1. C.O. 879/20-231, pp.60-62.

2. C.O. 879/20-232, p.62.

3. African Churches which permit polygamy were not established until the late nineteenth and early twentieth century, e.g. The United Native African Church was established in 1891; see J.F. Ajayi, Christian Missions in Nigeria, 1841-1891: The Making of An African Elite (London, 1965), pp.253-254.

the Marriage Ordinance, 1884,[1] and were retained in all subsequent marriage regulations enacted in Nigeria since then. They create a legal barrier against polygamous marriages under statute law, and a rigid separation between the two types of marriages. No one can be validly married under the Nigerian Marriage Act, and under customary law, including Islamic law, at the same time, unless it is to the same person, and the customary law marriage preceded the statutory marriage.[2]

The Matrimonial Causes Decree, 1970[3] has reinforced the monogamous nature of statutory marriage by providing that a marriage that takes place after the commencement of the Decree is void where either of the parties is, at the time of the marriage, lawfully married to some other person.

(11) Breaches of the monogamy provision of the Marriage Act

The Marriage Act provides that whoever contracts a marriage under the Act when already married by customary law to a third party,[4] and whoever contracts a marriage by customary law when already married under the Act, whether the parties are the same or not,[5] commits an offence, carrying a maximum punishment of five years imprisonment.[6] The spouses of a customary marriage, however, may subsequently marry each other under the Nigerian Marriage Act.[7]

A person who contracts a statutory marriage during the subsistence of a prior statutory marriage also commits

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1. Marriage Ordinance, 1884, No. 14 of 1884, s.37.
2. Marriage Act, 1914, Cap.115, Laws of the Federation of Nigeria, ss.33(1) and 35.
3. Decree No. 18 of 1970, s.31(1)(a): see also the Criminal Code Act, 1916, Cap.42, Laws of the Federation of Nigeria, s.370.
4. S.33(1) Marriage Act, Cap.115, Laws of the Federation of Nigeria, 1958 Revision.
5. Ibid., s.35.
6. Ibid., ss. 47 and 48.
7. Ibid., s.35.

an offence under the Criminal Code Act.[1]

Various assertions of the number of Nigerian men who commit breaches of the monogamous provisions of the Marriage Act have been made by writers, but most of these statements are based on inadequate facts. For example, Aguda says:

> "...the vast majority of Nigerian men, may be the percentage is over 95, practise polygamy in one form or the other. A number of these ostensibly practise monogamy but have one or two other 'wives'. Some of them who are cautious do not perform 'marriage ceremonies' with the other 'wives'. But some in fact do perform these ceremonies to which they in fact invite people who have to do with the administration of justice including Police Officers, Doctors, Lawyers, Ministers of State and Religion, top Civil Servants, etc., who attend such ceremonies with full knowledge of the correct situation. The fact is that...some of these people themselves have perhaps indulged in a similar breach of the law".[2]

Similarly, the former Chief Justice of Nigeria, the Honourable Dr. Taslim Elias, has been reported as saying that 95 percent of Nigerian men married under the Act would be in jail, if the strict rules of the Act were to be enforced.[3]

It would be interesting to know how these learned members of the Judiciary arrived at their percentages, but it is not difficult to see that they are mainly conjectural. From these and other similar vague statements, however, legal writers have advocated the abolition of the sanction against the practice of polygamy under the Act, on the ground that it is unrealistic to expect "the registration of only one wife in Nigeria as this will not agree with the natural inclination of the people".[4]

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1. Cap.42, Laws of the Federation of Nigeria, 1958 Revision, s. 370, referred to as bigamy, see Nwankpele v. Nwankpele [1973] 3 U.I.L.R. 184.
2. Akinola Aguda, Select Law Lectures and Papers, op.cit., p.84; see also Itse Sagay, "Multiple Marriages in Nigeria: A Conflict of Law and Culture, Nigerian Bar Journal, Vol.XII, 1974, p.82.
3. See the Nigerian, Daily Times, 26 Oct. 1973, p.3. under the caption "Daily Times Opinion".
4. Ijalaye, "Marriage Laws in Nigeria", op.cit., p.28.

How valid are such assertions? To assess these statements it is necessary to differentiate between the various types of polygamy that may be found in Nigeria. It has previously been stated that polygamy in Nigeria may be mainly of two types, namely, cases where (1) a husband cohabits simultaneously as husband and wife with two or more women -"simultaneous polygamy," and (2) a man owes marital obligations to two or more women, although at any one time he may be married to or living with only one of the women -"consecutive polygamy".[1]

It has been seen also that in both customary and Islamic law marriages, in all parts of Nigeria, the majority of men are monogamously married in fact, that is, they live with one wife only at any one time. This is especially the case in the Southern States where the level of polygamy is relatively low.[2] It is also men mainly from the Southern States who contract statutory marriages.[3] It follows, therefore, that the large majority of men who contract a statutory marriage does not practise simultaneous polygamy. It is undoubtedly true that a few persons, men and women, do commit breaches of the monogamy provisions of the Marriage Act, but most of these involve"consecutive polygamy," or as some writers prefer to call it,"consecutive monogamy." There is no evidence to support the large percentages advanced by writers, of men who are in breach of the monogamy provision of the Act, nor are the breaches mainly due as alleged to the polygamic tendencies of Nigerian men.

A study of the cases involving breaches of the monogamous provisions of the Marriage Act, which have come before the courts in recent years, reveals that in the majority of cases, a subsequent customary marriage during the subsistence of a statutory marriage, is contracted,

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1. See further,above Chapter IV, pp.296-301.
2. See above, Chapter IV, Table 4:1,and 4:2, pp.344 and 345.
3. None of the Moslems interviewed in Maiduguri had contracted a statutory marriage.

not because of the desire to practise polygamy, but simply because of the difficulty and expense, as well as delay, involved in the dissolution of a statutory marriage. In actual fact, marital relations are seldom maintained with more than one woman at a time. Often when the subsequent purported customary law marriage is celebrated the spouses have already separated. If divorce from a statutory marriage were as easy[1] and inexpensive to obtain as divorce from a customary marriage there would be few breaches of the monogamy provision of the Marriage Act in contemporary Nigeria. The difficulty of obtaining a divorce from a statutory marriage contributes to breaches of the law more than a preference for polygamy does.

The position is clearer in this respect when it is a woman who is in breach of the statutory provisions.[2] For example, in Ochei v. Ochei and Onyejekwe,[3] the respondent husband claimed a divorce on the ground of his wife's adultery with the co-respondent Onyejekwe. The parties had been married under customary law, as well as under the Marriage Act. The wife, who wanted a divorce, repaid the dowry paid with reference to the customary marriage, to the respondent's family in Onitsha, for onward transmission to him, then stationed in Lagos. Without obtaining a divorce of her statutory marriage, the evidence revealed that the wife married Onyejekwe according to customary law. As a result of this marriage, she was allowed all the rights and privileges of an Onitsha housewife, including the allocation of a stall at the Onitsha market reserved for the Ikporo Ogbe (Housewives' association) of Odoje village, the village of Onyejekwe.

It is evident that the wife in this case did not intend to practice polygamy, but simply to avoid the difficulty and delay of a statutory divorce. This fact

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1. See Sagay, "Multiple Marriages in Nigeria", op.cit.,p.84; see also Evoraja v. Avoraja and Anor.[1961] W.N.L.R.6..

2. There are quite a few women married under the Nigerian Marriage Act who purport to contract subsequent customary marriages without first obtaining a divorce from the statutory marriage. Such cases come less often before the courts, however.

3. [1971] Suit No. O/9D/71, unreported, Onitsha High Court.

would not have been so evident, had it been the husband who was involved in a breach of the Marriage Act. If breaches of the monogamy provision of the Marriage Act is to be, at least, reduced, one solution is to make statutory divorce easier and less expensive to obtain.

A few of the decided cases show that parties to a statutory marriage who have no valid ground for a statutory divorce, have used the invalidating provisions of the Marriage Act to have their marriages declared void. For example, the husband petitioner in Ijituyi v. Ijituyi,[1] in an uncontested suit sought a declaration that his marriage to the respondent was void, on the ground that, at the time the marriage was celebrated, he was already married to two other women, one married in 1959, and the other married in 1964. His evidence disclosed that when he married the respondent in 1971, the previous customary law marriages had not been dissolved or annulled, and that both women were still alive in 1971. No other witness was called. It was held by the High Court, that the petitioner, apart from his ipse dixit, had not proved that he went through any form of customary marriage, or at the time of his marriage to the respondent the prior marriages had not been dissolved, or that the women concerned were alive when he went through the form of marriage in respect of which he had brought the petition. A declaration of nullity was refused.

The invalidating provision of the Marriage Act is often used by persons who wish to escape from the liabilities of a statutory marriage. A husband of a statutory marriage may be liable to pay maintenance to his divorced wife. If the marriage is declared void, however, prior to the enactment of the Matrimonial Causes Decree, 1970,[2] no such liability attached. An unscrupulous husband who was sued for divorce would therefore make strenuous efforts to have his

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1. [1976] Suit No. HOD/32/75, IOD.H.C.35; see also Ajetombi v. Ajetombi [1975] 11 CCHCJ. 2065.

2. See s.69, of the M.C.D. 1970 now provides: "marriage" includes a purported marriage that is void, for the purpose of maintenance, custody and settlement under part IV of the Decree. This means that a husband or wife of a void marriage is liable for maintenance.

marriage declared void instead.

Two cases which illustrate this strategy are Uwaemelulam v. Uwaemelulam[1] and Okolo v. Okolo.[2] In Uwaemelulam v. Uwaemelulam, the petitioner stated that her marriage with the respondent in 1961 had never been a happy one, mainly due to his demands that she hand over her pay-packet intact to him. When she stopped this practice, it resulted in endless quarrels and beatings, and eventual eviction of the petitioner from the matrimonial home. She claimed that her marriage was celebrated in church, and that it was her intention to go through a form of marriage which was recognized under the Marriage Act, and by the Church. The respondent, who admitted that he had married another woman under customary law in 1971, also admitted that his marriage to the petitioner was celebrated between the hours of 8 and 6, in the presence of witnesses, after publication of banns of marriage in the Church, a licensed place of worship; but he maintained that they merely went to Church to have the prior customary law marriage between them blessed in Church. He asked that the marriage be declared void. It was held that the marriage was a valid marriage under the Act, and that the petitioner was guilty of adultery on his own admission that he had married the woman cited and was living with her as man and wife.

In Okolo v. Okolo[2] the wife petitioner averred that she was married under the Marriage Act at the marriage registry at Afikpo, on 3 January, 1963. She petitioned for the dissolution of marriage on the ground of desertion. The respondent agreed on the facts as stated by the petitioner and he also wished the marriage to be dissolved. But he

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1. [1972] Suit No. AD/1D/72, unreported decision of Umuahia High Court decided on the 10 July, 1972.

2. [1974] Suit No. AA/3D/72 unreported decision of Awka High Court, delivered 24 June, 1974. cf. Ojo v. Ojo [1972] Suit No. A/4D/72, unreported decision of Aba High Court, delivered on 1 December, 1972, where the petitioner obtained a declaration of nullity of her marriage to the respondent on the ground of his two prior subsisting customary law marriages, although the alleged customary law marriages were not proved.

alleged in his answer to the petition, that before his marriage to the petitioner, he had been married to another woman under customary law, to the knowledge of the petitioner, and that this woman named Clarice was still alive. He asked that the statutory marriage be declared void. Aseme, J., held that the effect of this allegation of a purported customary law marriage, if proved, would be to render the subsequent marriage under the Marriage Act void, but he further held that the onus to prove the alleged customary marriage was on the respondent. The respondent alleged that when he swore the affidavit and filled the forms at the marriage registry, he disclosed his prior existing customary marriage to the Registrar, but the Judge did not believe him, and categorised him as an untruthful witness whose avowed aim was to stigmatise the character of the petitioner. A declaration of nullity was refused.

In some cases, the breach of the law is occasioned by ignorance of the law.[1] While most Christian churches do not permit their members to contract multiple marriages, there are several churches which do permit the practice of polygamy by members of the church.[2] The ordinary Nigerian citizen would therefore be justified in thinking that marriage is regulated by the church, and as a result may inadvertently commit a breach of the law. The confusion which may result from the different Church rules in this respect is illustrated by the case of Uwakwe v. Uwakwe and Anor.[3] The caveatrix in this case objected to the notice of an intended statutory marriage between the first and second respondents on the ground that she too had been

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1. During field-work in various parts of Nigeria, the present writer discovered that while most people knew that the spouse of a subsisting statutory marriage cannot contract a valid customary marriage with a third party, very few people realized that the spouse of a subsisting customary marriage cannot contract a valid statutory law marriage with a third party. Most people are thoroughly confused about the difference between a marriage celebrated in church and one solemnised in a Registry Office.

2. See J.B. Webster, Attitudes and Policies of the Yoruba African Churches towards Polygamy in Tropical Africa, op. cit., p.224; Turner, History of the African Independent Church, op.cit., Vols. I and II.

3. [1971] Suit No. HU/15M/71 unreported, Umuahia High Court.

married to the first respondent in 1970, according to customary law, and that the marriage had not been dissolved. The evidence disclosed that the first respondent married the second respondent in 1948, according to customary law. This marriage was followed in 1949 by a marriage under the Marriage Act, celebrated in a Roman Catholic Church, according to the rites of that church. In 1964, the first respondent renounced the Roman Catholic religion, and joined the Seraphim and Cherubim Church which permitted the practice of polygamy. In January, 1970, he married the Caveatrix in the Seraphim and Cherubim Church. In September, 1970, he joined the church of the Jehoviah Witnesses, who decreed that he must abandon the second wife since the practice of polygamy is prohibited in that church.

It was "this journey from one church to another and from one woman to another which landed him in the High Court, Umuahia". Aniagolu, J., found that the first and second respondents were validly married on 28 May, 1949, in accordance with the Marriage Act, and that this marriage was still subsisting at all material times, including 12 July, 1971, when he purported to give notice to the Registrar of Marriages of his intention to marry the second respondent, and at the time of the hearing of the caveat. As a result, his purported marriage to the caveatrix in 1970 was wholly null and void, and completely devoid of legal effect. The Judge noted that the purported marriage contracted between the Caveatrix and the first respondent would appear to have contravened the Marriage Act, and to have been bigamous under section 370 of the Criminal Code Act.[1]

The court also held that the first respondent was not entitled to marry the second respondent again, they being already lawfully husband and wife. The notice of marriage to the Registrar of Marriage was accordingly declared forbidden.[2]

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1. See R. v. Princewell [1963] 2 All N.L.R. 31, [1963] N.R.N.L.R. 54. For questions arising out of this interpretation of section 370 of the Nigerian Criminal Code Act, see A.N. Allott, [1964] 8 J.A.L. p.36.

2. The Marriage Act does not expressly forbid multiple marriage under the Act by the same parties, but, provided the first marriage is legally valid, the subsequent ceremony will be a nullity, see Thynne v. Thynne [1955] 3 All E.R. 129, C.A; [1955] P.272; footnote continued.....

Penalty for breaches of the "monogamy" provisions of the Act

As previously noted, the Marriage Act provides a punishment of five years imprisonment for breaches of sections 33(1) and 35 of the Marriage Act.[1] The Criminal Code Act[2] imposes a penalty of seven years imprisonment on any person who, "having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife". There is only one case, however, in which a conviction under either statute has been recorded. In that case, R. v. Princewell,[3] the accused was married under the Marriage Act. During the subsistence of the statutory marriage, he married another woman under Islamic law, as he had then become a Moslem and thus entitled to marry four wives. Reed, J., noted the fact that in his experience on the Bench, and Bar, since 1946, he had not seen a prosecution for bigamy, the designated offence under section 370 of the Criminal Code. Princewell was found guilty of the crime of bigamy and sentenced to one month's imprisonment, but the Judge expressed sympathy for the accused.

The position has now reached a state where the party who has himself committed the breach has openly declared this fact in court in many cases in all parts of the country. In most cases, these declarations pass without comments by the Bench as to their possible illegality.

The question then arises: how far is it justifiable to retain in the statute books a law which is evidently not being enforced? Reed, J., in R. v. Princewell[3] said that the reason why bigamy is severely punished in the

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Footnote 2 continued..... Reder v. Reder [1948] The Weekly Notes, p.238, C.A.

1. See ss.47 and 48 Marriage Act., Cap 115, Laws of the Federation of Nigeria, 1958 Revision.
2. Cap 42, Laws of the Federation of Nigeria, 1958 Revision.
3. [1963] 3 All N.L.R.31; [1963] N.R.N.L.R. 54.

United Kingdom, is that the woman has been deceived into cohabiting with the accused in the belief that he is her husband. Writers have claimed that the contrary is the case in Nigeria,[1] and indeed in other parts of Africa,[2] where "all parties are acting with their eyes open".[3] Consequently, they have argued that the penal provisions of the Marriage Act, and the Criminal Code in respect to bigamy, should be repealed. Collingwood[4] points out that the law of bigamy is designed to uphold the sanctity of monogamous marriage, an idea the average African does not fully accept, since the African society is generally polygamous.

Neither of these reasons can be supported. Firstly, the average Nigerian woman may know that the man is married to another woman under the Marriage Act, at the time she goes through a form of customary law marriage with him. But very often, she does not realise the legal effect of her purported marriage to him under the present law. She does not realise that many of her rights, and the rights of any children she may produce by him, may be adversely affected, and in some cases that the consequences can be disastrous.[5] The Registrar of marriage or Minister

1. See Itse Sagay, "Multiple Marriages in Nigeria", op.cit., p.87; D.A. Ijalaye, "Marriage Laws in Nigeria: Harmonisation or Unification? Nigerian Bar Journal, Vol.XII, 1974, pp.21-31 at p.29.

2. See e.g., the position in Uganda, - H.F. Morris and James S. Read, Uganda: The Development of its Laws and Constitution (London: Stevens and Sons, 1966), p.398

3. Ibid., p.398.

4. J. Collingwood, Criminal Law of East and Central Africa, (London: Sweet and Maxwell, African University Press, 1967), p.134; See also Sagay, "Multiple Marriage in Nigeria, op.cit., p.85; Ijalaya, "Marriage Laws in Nigeria, op.cit., p.28.

5. See e.g. the numerous cases which held that children born to an intestate as a result of his purported customary marriage during the subsistence of a statutory marriage are illegitimate and are, therefore, not entitled to inherit from him, - Cole v. Akinyele [1960] 5 F.S.C.84; Olympio v. Oluwole and Anor. [1968] N.M.L.R. 469; Abisogun v. Abisogun [1963] 1 All N.L.R. 237; Craig v. Craig [1964] L.L.R.96; Onwudinjoh v. Onwudinjoh [1957] 2 E.R.N.L.R.1; In the Matter of the Estate of Odulaja

footnote 5 continued.....

of religion who celebrates a marriage under the Act, has a statutory duty to warn the spouses of the penalties they may incur for breaches of the "monogamy" provisions of the Act. They are told of the effect of any prior or subsequent marriages to a third party. The woman or man who purports to contract a subsequent customary marriage with the spouse of an existing statutory marriage is not warned of the consequences of his or her action.

Secondly, with regard to the argument that African society is essentially polygamous, even if it is conceded that this is true, all Nigerians are free to choose the type of marriage they may wish to contract. The Nigerian man can therefore opt for a customary law marriage which allows him to practise unlimited polygamy. If, in spite of this freedom of choice he chooses to contract a monogamous statutory marriage, he should be made to respect his solemn undertaking.

As previously stated, many breaches of the law are not due to a desire to practise polygamy but to a variety of other reasons. This is especially apparent from a study of the more recent cases coming before the court.

3. Fundamental Requirements for a Valid Marriage under the Nigerian Marriage Act

A. Types of marriage

Considerable confusion has resulted from a misunderstanding of the types of marriages that are recognized

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Footnote 5 continued..... [1964] L.L.R.108; Osho v. Phillips and Ors. [1973] 3 U.I.L.R.316; Idowu v. Bakare [1974] 6 C.C.H.C.J. 675; Cf. Aduba and Anor. v. Aduba and Ors. [1966] Suit No. O/106/63; where Egbuna J. stated that "It is clear from the authorities that where a child born out of wedlock is acknowledged by the putative father he is to be regarded as legitimate and all legitimates are entitled to share in their father's estate...the question of their parents' marriage is not a relevant subject for investigation". He held that all the deceased's children by purported customary law marriages, during the existence of his marriage under the Marriage Act, were entitled to share in the deceased's intestate estate. See also Constitution of the Federal Republic of Nigeria, (Enactment Decree, 1978, No.25 of 1978, s.39(2): "No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth".

as valid legal marriages in Nigeria. This misunderstanding is especially apparent in the work of sociologists and anthropologists. For example, McEwen states the types of marriages which operate throughout the Federation of Nigeria as"(1) Marriage by Native law and Custom, (2) Moslem marriages (3) church marriages and (4) marriage according to the Ordinance" and continues:

> "All these types of marriages are legal according to the laws of Nigeria, and there are provisions for separation and in some cases divorce".[1]

Similarly, Uchendu, writing about new trends in the Igbo family system, says:

> "Many other changes have taken place in the Igbo family system in the last fifty years. Christian marriage and marriage by ordinance are among the important innovations. Both have given women new legal protection and property rights not recognized by the traditional system...."[2]

These writers differentiate "church" marriage and "ordinance" marriage and assign to both a legal status under Nigerian law. The misconception of the types of marriages, regarded as legal marriages in Nigeria, among non-legal writers, may have been induced by the fact that some legal writers, judicial decisions, as well as statutes refer to "Church" marriage and "Christian" marriage as if they were in all cases valid legal marriages, or alternatives to marriage under the Marriage Act.[3]

Strictly speaking, there are only two types of legally recognized marriages that may be celebrated in Nigeria. These are:

(a) a customary law marriage which includes Islamic law marriage; and

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1. Winifred McEwen, "Marriage Problems in the Federation of Nigeria", Women Today, June,1964, Vol.VI, No.2.pp.35-36.
2. Uchendu, The Igbo of Southeast Nigeria, op.cit.,p.56; see also Okonjo, The Impact of Urbanization,... op.cit.,pp.164-165.
3. See e.g. the Criminal Code Act, ss.1, 33, 34; the Act defines a Christian marriage as "a marriage which is recognized by the law of the place where it is contracted as the voluntary union for life of one man and one woman to the exclusion of all others".

(b) marriage contracted under the Nigerian Marriage Act.
Marriages contracted in Nigeria which are not included in any of these two categories are not legally valid marriages in Nigeria.

B. Basic essentials of a marriage under the Marriage Act

Section 33(2) of the Nigerian Marriage Act provides:

> "A marriage shall be null and void if both parties knowingly and wilfully acquiesce in its celebration -
>
> (a) in any place other than the office of a registrar of marriages or a licensed place of worship (except where authorised by the licence issued under section 13; or
>
> (b) under a false name or names; or
>
> (c) without a registrar's certificate of notice or licence issued under section 13 duly issued; or
>
> (d) by a person not being a recognized minister of some religious denomination or body or a registrar of marriages".

The first draft of the Marriage Ordinance submitted by Justice Jackson made void all marriages celebrated in a church which did not comply with the prescribed regulations.[1] These prescribed regulations were retained in all subsequent drafts and enshrined in the 1884 Marriage Ordinance.[2]

The Earl of Derby, in his amendment of Mr. Woodcock's draft, had suggested that the publication of banns by churches should be allowed as a substitute for notice to, and a certificate by, the registrar, as he considered the two-fold notification unnecessary. The Legislative Council of the Gold Coast Colony, however, were of the opinion that the notice to, and the certificate by a registrar, should, in all cases be compulsory, and the publication of banns, the form of which could vary according to the rules of the various churches, optional. The view of the Council prevailed, and is represented by section 33(2) of the present Nigerian

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1. See C.O. 879/2-210, pp.19-22, Dispatch 441, 18 Sept.1882, enclosure 6 in No. 18.

2. See s.35, Marriage Ordinance, 1884.

Marriage Act as stated above.

C. "Christian" or "Church" marriage

A "Christian", or "Church" marriage is not a legally valid marriage, unless certain formalities prescribed by the Nigerian Marriage Act[1] are observed. For example, in Obiekwe v. Obiekwe,[2] the parties were married according to customary law. Without obtaining a Registrar's certificate as required under section 11 of the Marriage Act, they went through a religious ceremony in a church.

Commenting on the legal validity of the church marriage, Palmer, J., succinctly enunciated the law thus:

> "A good deal has been said about 'church marriage', or 'marriage under Roman Catholic Law'. So far as the law of Nigeria is concerned, there is only one form of monogamous marriage, and that is marriage under the Ordinance. Legally a marriage in a Church (of any denomination) is either a marriage under the Ordinance or it is nothing. In this case, if the parties had not been validly married under the Ordinance then either they are married under Native Law and Custom or they are not married at all. In either case the ceremony in church would have made not a scrap of difference to their legal status".[2]

The root of the misconception as to the legal validity of church marriage is to be found in the historical origin of Nigerian monogamous marriage. Before the enactment of the Marriage Ordinance 1884, ministers of the various Christian churches in different parts of the country solemnized the marriages of members of their church by publication of banns, and in accordance with the rules and tenets of their particular denomination. As seen previously, such marriages were of doubtful legal validity,[3]

1. Cap 115, Laws of the Federation of Nigeria, 1958 Revision.
2. [1963] 7 E.N.L.R. 196 at 199.
3. Various statutes were passed to validate these marriages: e.g. Marriages Validation Act (previously Ordinance) 1914 No. XI of 1914, which was an ordinance to remove doubts as to the validity of certain marriages: "Whereas many marriages according to Christian rites have been celebrated in the districts of Ejebu-Ode, Meko, Oyo, Ondo, Ilesha, Ibadan and Whereas doubts have been expressed as to the validity of marriages celebrated as aforesaid", all such

footnote 3 continued.....

and it is for this reason that the enactment of a Marriage Ordinance became necessary.

The Churches, however, from the beginning, were not happy with what is now section 33(2) of the Marriage Act, since they regarded marriage as being in the nature of a sacrement, and they resented interference by the civil authorities.[1] They demonstrated their hostility by calculated non-compliance with the provisions of section 33(2) of the Act. Most of the churches, especially the Catholic churches, ignored the existence of the Marriage Act and continued to celebrate marriages in much the same way as they had done before its promulgation, - by publication of banns, followed by a religious ceremony performed by a minister of the church.

Okagbue, J., commenting on this attitude of the churches notes:

> "It is perhaps not surprising that, in many cases, officiating priests, especially of the Roman Catholic Church, have openly declared that they could not be 'bothered' with the law of the land and that what mattered to them was a celebration of marriage in accordance with the rites of the Roman Church".[2]

The certificate of marriage issued after a church ceremony is usually different in form from that prescribed in the Marriage Act (Form E of the first Schedule).

In Obi v. Obi[3] the certificate issued by a Catholic church in Onitsha, was not signed by the parties to the marriage, nor by the witnesses, and certain vital information required by the Act was omitted. In addition, although the certificate purported to be signed by one John Mary Anojulu as the officiating minister, oral testimony in court revealed that the minister who actually performed the ceremony was in fact one Reverend Father Onyekachukwu.

Footnote 3 continued.... marriages "shall be deemed to have been from the time of the celebration thereof a legal and valid marriage".

1. See R.O. Okagbue, "The Marriage Dilemma" in African Indigenous Laws, edit. by T.O. Elias et.al., op.cit., p. 178.
2. Ibid.,p.178; see also Nwogugu, Nigerian Family Law, op.cit.,p.35.
3. [1974] Suit No. O/8D/74, unreported, Onitsha High Court; see also Akwudike v. Akwudike [1963] 7 E.N.L.R.5.

It was held that the certificate "could not be regarded as a legal certificate of a lawful marriage", and that it had "no forensic weight and/or value".[1]

This nonchalant attitude adopted by the churches towards the legal formalities required by the Marriage Act, has led to legal complications and disappointments. Many women who had gone through a form of marriage in church, confident that they were contracting a legally valid monogamous marriage, have now discovered, as the decisions in some of the recent cases become known, that they are married according to customary law only, or in some cases that they are not married by any law.

As seen previously, the validity of a marriage celebrated in a church, contrary to section 33 of the Marriage Act depends on the knowledge of the contracting parties.[2] The marriage will only be void if both parties, knowing the particular requirements of the Act which are specified in section 33, wilfully acquiesce in celebrating the marriage without complying with the specified requirements. A few of the decided cases will illustrate the legal position.

In Akparanta v. Akparanta,[3] the respondent husband contended that he married the petitioner according to native law and custom, in December, 1962, and that the ceremony in church in May 1963, was not intended to be a monogamous marriage, but merely a church blessing of the existing customary marriage. The respondent further contended that the church ceremony did not constitute a valid marriage under the Marriage Act, since it was performed without the previous issue of a registrar's certificate of notice. The

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1. See Madubuko v. Madubuko [1973] Suit No. E/18D/72, unreported, Enugu High Court, 13 June, 1973, where a certificate signed by Rev. Father Conlan, although the marriage had been solemnized by Rev. Father Bartley, who died the morning after the wedding without signing the marriage certificate, was held to be of "doubtful validity" by Justice K.O. Anyah.
2. See above, p.145.
3. [1972] 2 E.C.S.L.R. 779.

wife's evidence was that she left all formal arrangements with the husband and trusted that he had carried out all the necessary preliminaries to the marriage. It was held that it is not enough if the evidence establishes acquiescence by one party, if the other party acted in complete ignorance of the requirements. That the evidence would be stronger if it is the wife who so acted, relying, as in this case, on the husband to perform the preliminaries, "since the raison d'etre of the provision is to protect the unsuspecting party, usually the wife, from the exploitation of her ignorance of the statutory requirement or her confidence in the party, usually the husband, in arranging the marriage". The marriage was held to be valid.

Similarly, in Obiekwe v. Obiekwe,[1] where the court found that both parties believed at the material time that they had contracted a valid marriage under the Marriage Act, it was held that it could not be said that they "knowingly and wilfully" acquiesced to a marriage without a Registrar's certificate. Accordingly the marriage was held valid even though it had been celebrated without the prior issue of a Registrar's certificate. Palmer, J., said:

> "knowingly" by itself might be ambiguous, but 'wilfully' must, I think, mean a deliberate act. The attitude of mind must, I think, be I know there ought to be a certificate; I know there is not a certificate; nevertheless I shall go through with the ceremony".[2]

This attitude seemed to have been the frame of mind of the parties in Maraizu v. Maraizu,[3] where the wife

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1. [1963] 7 E.N.L.R. 196.
2. Ibid., p.198.
3. [1974] E.C.S.L.R. ; see also Ejikeme v. Ejikeme [1971] Suit No. 2/1/OD/71, unreported, Onitsha High Court. Mbagwu v. Mbagwu, [1972] Suit No. AB/4D/69, unreported, Aba High Court, 21 June, 1972 and Dike v. Dike [1973] Suit No. E/14D/72, unreported, Enugu High Court, 28 March, 1973 where the wife stated that she left all arrangements to the husband and thought all statutory requirements had been complied with; it was held that she had not knowingly and wilfully acquiesced in the celebration of the marriage contrary to s.33(2).

petitioner admitted that she knew that a certificate was necessary. In fact, she looked for the Divisional Officer to get the Registrar's certificate from him, but when she could not find him, both parties nevertheless signed a marriage certificate issued by the minister. This marriage certificate indicated that the marriage had been celebrated after publication of banns, and was signed by the minister, one G.U. Agbasimoro. In actual fact, no banns had been published. Although the marriage certificate had been signed by the parties on the 1st day of May 1969, the marriage actually took place on the 2 May 1969. The certificate allegedly issued by the minister, clearly told a lie. The marriage was held null and void, since both parties, knowing that a Registrar's certificate was necessary, had "knowingly and wilfully" celebrated the marriage without obtaining one.

This case was an unfortunate one, because attempts by the parties to conclude arrangements for the celebration of a marriage according to customary law did not materialize. As a result, the parties were not validly married by any law, and the child born as a result of their union was consequently illegitimate.

In Obi v. Obi,[1] the wife petitioner claimed that her marriage with the respondent was not valid by reason of failure to comply with sections 7, 11, 12, 181,21, 22, 23, 25 and 26 of the Marriage Act. She petitioned for a declaration that the marriage was void. She also claimed alimony pendente lite and costs of the proceedings.

The respondent husband claimed to be lawfully married to the petitioner, and stated that at the time the priest performed the ceremony, he was satisfied with it, and did not know that anything was wrong with the ceremony. The Judge, in declaring the marriage void, said:

> "The positive evidence of the petitioner was that it was a purely Catholic ceremony, as opposed to one amounting to a lawful marriage under the Act. This evidence was not rebutted by the evidence of the respondent who failed to testify that a legal marriage was intended by the parties".

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1. [1974] Suit No. O/8D/74, unreported, Onitsha High Court.

He refused the petitioner's claim for alimony[1] and costs, on the ground that, where a wife wilfully went through a ceremony of marriage which she knew to be void, and waited some three years before bringing a petition of nullity, she ought not to be entitled to award of any alimony, or costs.

This case may be compared with Anyaegbunam v. Anyaegbunam[2] where the Supreme Court held that the wife petitioner's failure to dispute the testimony of the respondent that no Registrar's certificate had been obtained before the church ceremony, and also her failure to testify that the omission to obtain the certificate was not done "wilfully and knowingly" made the purported marriage null and void.

On the other hand in Udoiwed v. Udoiwed,[3] the petitioner claimed dissolution of her marriage within three years of marriage on the ground of exceptional hardship due to the husband's adultery. Her evidence was that she and the respondent were married according to customary law after which they went through a ceremony in church. She believed that it was a form of marriage which recognized "the union of one woman to a man to the exclusion of all others". The respondent claimed that the marriage which was celebrated in the Qua Iboe Church was a polygamous marriage, and that it was clearly pointed out to himself and the petitioner at the time of the marriage that he could marry more than one wife.[4] He produced a marriage certificate written in Efik, which translated into English, stated that a Christian marriage was intended and a Christian marriage was performed in the Qua Iboe Church. The respondent contended that this meant that it was not a marriage under the Marriage Act, but

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1. Under the Matrimonial Causes Decree, 1970, the spouses to a void marriage may claim all financial benefits available to spouses of a valid marriage, see s.69.
2. [1973] 4 S.C.121; [1973] 3 E.C.S.L.R.243.
3. [1963] Suit No. A/M30/63, unreported decision of the Aba High Court, 18 December, 1963.
4. The Qua Iboe Church in Eket prohibits the practice of polygamy, but some branches of the Church in other parts of Nigeria permit polygamy among members of the Church.

one by the rites of the Qua Iboe Church only, and that consequently, the marriage was legally a customary marriage, and the High Court therefore had no jurisdiction to entertain the suit. Idigbe, J., said:

> "It appears to me that where there is evidence of the performance of a Christian marriage and the parties to it lived in consequence as husband and wife and cohabited together (as was alleged in the affidavit) everything necessary to ensure the validity of the marriage should be presumed in the absence of decisive evidence to the contrary".

He held that the marriage, ex facie a Christian marriage, was in accordance with the Marriage Act, until the contrary was proved during the trial of the main petition, and that the Court therefore had jurisdiction.

In Mbagwu v. Mbagwu,[1] Umezinwa, J., held that the High Court had no jurisdiction to grant a decree of dissolution of marriage since both petitioner and respondent testified in court that they intended to contract and actually contracted a purely "Church" marriage, and not one under the Nigerian Marriage Act.

The principle of law to be deduced from the decided cases is, that a marriage celebrated without obtaining a registrar's certificate, or in an unlicensed place of worship, or by a person not being a recognized minister of some religious denomination, or under a false name or names, will nevertheless be valid, if it is proved that:

(1) the parties, or at least one of them had intended to contract a valid monogamous marriage under the Marriage Act; and

(11) the parties, or at least one of them who had the intention to contract a monogamous marriage, did not knowingly and wilfully acquiesce in the celebration of the marriage without complying with the provisions specified in section 33(2).[2]

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1. [1972] Suit No. AD/4D/72, unreported, 21 June, 1972.
2. See e.g. Akwudike v. Akwudike [1963] 7 E.N.L.R.5; Obiekwe v. Obiekwe [1963] 7 E.N.L.R.196.

Numerous marriages are celebrated in the churches without a Registrar's certificate or a Special Licence being obtained. Such marriages, consequently are not registered with the Registrar of marriages. For example, in 1975, only 191 marriages were recorded as celebrated under the Act in Onitsha Division.[1] Yet examination of the Marriage Registers of only five churches in Onitsha town, by the present writer revealed a total of 300 marriages celebrated by those five churches in 1975. Onitsha town alone has more than ten churches. Aba Division recorded a total of five marriages registered under the Marriage Act for the whole of 1972[2]. Yet there are many more than five churches in Aba,[3] in each of which marriages are frequently celebrated.

An examination of the Marriage Registers of the churches visited in Onitsha seems to indicate that most of the certificates issued to married couples were not in the form required by the Marriage Act. For example, 513 marriages were celebrated at St. Mary's Catholic Church Onitsha from 1933-1973. The certificates signed by the parties and the particulars noted on them, showed that only in three cases were Registrar's certificates obtained, and a form of certificate in accordance with the Act given to the parties. Examination of the Marriage Register of All Saints Cathedral, an Anglican Church in Onitsha, showed that before 1976, no books of marriage certificates were ever obtained, or kept by the Church as required by the Act. In 1976, the Divisional Office in Onitsha sent out a Circular to all churches prohibiting them from conducting any form of marriage without obtaining a Registrar's Certificate or a Special Licence.[4] It was as a result of this Circular

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1. See Statistical Bulletin of the Ministry of Chieftancy Affairs, Social and Community Development, Enugu, March, 1977.
2. Statistical Bulletin, ibid.
3. Aba is a large cosmopolitan commercial Igbo town.
4. The former practice of some Churches, whereby couples who have contracted a customary marriage, or a marriage under the Nigerian Marriage Act at a Registry Office would later go to Church to have the marriage "blessed" by a church ceremony was by this Circular no longer permitted. Church "blessing" does not constitute a valid marriage, nor has it any legal effect on a civil marriage solemnized before a Registrar of Marriages. See Martins v. Adenugba [1946] 18 N.L.R.63.

that All Saints Cathedral started to register marriages, celebrated in church, in accordance with the Act. In 1976, fifty-six marriages were celebrated in the Church, under the Marriage Act, but three marriages were, in spite of the Circular, celebrated without the Registrar's certificate or licence. When the Sacred Heart, Catholic Church Onitsha was visited by the present writer,[1] four marriages were being celebrated. Opportunity was taken to examine the certificates given to three of the couples. None of them were in the form required by the Act. They were merely Church Certificates which omitted much of the vital information required by the Marriage Act. The reason given by the Catechist of the Church for the failure to get the requisite Registrar's certificate, and the issue of certificates which were not in accordance with the form prescribed by the Act, was that there were no printed Marriage Certificate forms available at the Divisional Office in Onitsha. These forms previously had to be obtained from Lagos, and it was repeatedly alleged by the Church Authorities that more often than not these forms were unavailable. At present, however, because of complaints of defects in the previous system, the States are permitted to print their own Marriage Certificate forms, which should reduce the hardship experienced in obtaining these essential forms.

The retention of the registrar's certificate as a key determinant for the validity of a marriage under the Nigerian Marriage Act has been criticized. Achike asserts:

> "The insistence on the compliance with the issuance of the Registrar's Certificate as a sine qua non to the effectuation of a valid marriage attaches undue artifical importance to a borrowed practice which is wholly meaningless in the pluralism of the marriage system in Nigeria. It relegates to the background the parties intention to evolve a monogamous union under the Marriage Act. It is clear that the insistence on the compliance with issuance of Registrar's Certificate affords the easiest escape

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1. The visit was made on 13 August, 1977.

> from the rigours of divorce proceedings. Thus even at the risk of bastardizing the issue of the marriage, the parties to a marriage, who may be unable to rely on any of the known grounds for instituting divorce proceedings or where the available evidence falls far below that prescribed by law may yet extricate themselves with impunity from their matrimonial bonds by averring in unison that 'they knowingly and wilfully acquiesced to the celebration of the marriage' despite the irregularity of non-conformity with issuance of the Registrar's Certificate".[1]

4. Conflict of Laws Occasioned by the Introduction of "Statutory" Marriage

A. Dual marriages ("double-decker")

(1) The legal effect of a statutory marriage subsequent to a customary law marriage between the same parties

The introduction of statutory marriage into Nigeria has resulted in conflicts in the law relating to marriage which in turn have been productive of uncertainty and complexity, all having an adverse effect on women's status in marriage and family life. Much of the confusion results from the fact that parties combine a customary marriage with a statutory marriage producing what has been aptly described by Read as a "double-decker" marriage.[2] The nature and some of the incidents of the two types of marriage are radically different and often conflicting.

It has been seen[3] that a rigid separation of the two types of marriage was envisaged in Lord Derby's proposals. An exception was, however, made, which allowed two persons married to each other under customary law to marry each other under the Nigerian Marriage Act, provided the customary marriage,[4] was in fact monogamous.[5] But the Act is silent

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1. Okay Achike, "The Myth of Registrar's Certificate in Act Marriages", N.B.J. Vol.XII, 1974, p.11 at p.18.
2. See James S. Read, "The Law of Husband and Wife in East Africa", in Integration of Customary and Modern Legal Systems in Africa, op.cit.,p.397.
3. See above, p. 129.
4. Customary and Islamic law marriages are merged for treatment for convenience of exposition in the term

footnotes 4 and 5 continued.....

on the important question of the legal effect of a statutory marriage on the prior customary marriage. In the courts, also, the question remains largely indeterminate due no doubt to the fact that cases in which both marriages have been celebrated in Nigeria, and which bear directly on this point, rarely come before the courts. Another reason may be that, as previously stated, there is a dichotomy of jurisdiction and the courts which exercise jurisdiction over a customary marriage are not the same as those courts which exercise jurisdiction over a statutory marriage.

Since 1974, the High Courts in the former East Central States have been given original jurisdiction over all causes and matters involving customary law, including marriages.[1] In Afonne v. Afonne,[2] it was noted that it is now necessary for spouses who have contracted both forms of marriage, and who are seeking a divorce, to state specifically which marriage or marriages they wish to dissolve.[3]

Legal writers have largely confined their attention to cases where one of the marriages is contracted outside Nigeria, and for the most part have ignored the situation where both marriages have been contracted in Nigeria,[4] yet the legal implications are of vital importance, especially to the legal status of women.

Footnotes 4 and 5 continued.....

4..."Customary marriage" in much of the following sections.

5. See the Marriage Act, Cap 115, Laws of the Federation of Nigeria, 1958 Revision, ss.11(1)(d); 33(1),35,47 and 48.

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1. See High Court Amendment Edict. 1974, and further above, Chapter II, p. 158.

2. [1973] Suit No. 0/6D/73, unreported, Onitsha High Court.

3. Compare the statement of Wrangham, J., in Ohochuku v. Ohochuku, [1960] 1 All E.R.253; it is important that the court which dissolves a marriage should make it clear in the decree which marriage it has dissolved. See also Thynne v. Thynne [1955] 3 All E.R.129; [1955] P.272; Hewett v. Hewett and Dupin [1929] 73 Sol.Jo.402; Reder v. Reder [1948] W.N.238.

4. But see R.O. Okagbue, "The Marriage Dilemma" in African Indigenous Laws, op.cit., pp.181-184.

To assess the legal implications it is necessary to identify some of the legal questions which may arise from a "double-decker" marriage.

(1) Does the subsequent statutory marriage terminate the customary marriage or do they both exist?

Nwogugu[1] asserts that a subsequent statutory marriage supersedes a previous customary law union on the ground that the relationship created by a statutory marriage, as well as the rights and obligations arising therefrom, are unknown to customary law. This contention, with respect, cannot be supported. Every system of customary law provides a procedure, no matter how simple, whereby a marriage may be dissolved. The customary law of a people can only be validly changed by an express statutory provision implying or asserting such a change, or by the adoption of a new custom by a significant majority of the people over a long period of time.[2] There is no statutory provision which expressly or by necessary implication provides that a customary marriage ceases to exist when the spouses contract a subsequent statutory marriage. The customary law cannot be changed simply by the celebration of a statutory marriage, an institution unknown to customary law.

Elias[3] also argues that a statutory marriage supersedes the prior or subsequent customary union, and that the latter is valid only if it stands alone. He submits that this is the net effect of sections 11(1)(d), 35, 47 and 48 of the Marriage Act. This view cannot be supported.

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1. See Nwogugu, Family Law in Nigeria, op.cit., p.59; see also Park, Sources of Nigerian Law, op.cit., p.132.
2. See Balogun and Anor. v. Ashodi [1931] 10 N.L.R. 36 and further, above, Chapter II, pp.178-180.
3. See Elias, Nigerian Legal System, op.cit.,p.294; for opinions to the contrary see O. Achike, "Statutory and Customary Marriage: A Comparison", Nigerian Law Journal 1967, Vol.2, No.1, p.49 at p.51; I.O. Agbede, "Recognition of Double Marriage in Nigerian Law, Int. and Comp. Law Quarterly, Vol.17, 1968, p.735.

A statutory marriage cannot supersede a subsequent customary union since a subsequent customary marriage after a statutory marriage is void.[1] It is also illegal and attracts a penalty.[2] The sections cited by the learned writer do not expressly or impliedly justify the conclusion that a statutory marriage supersedes a prior customary marriage.

In Akparanta v. Akparanta[3], Agbakoba, J., in considering the effect of the termination of a customary marriage on a statutory marriage, observed:

> "...there is nothing in the Act which precludes the superimposition of a statutory marriage upon a customary marriage. When that happens, the latter is not extinguished but co-exists with the former, although its termination, if it happens would not affect the continuance of the statutory marriage".[4]

The learned Judge gave no reasons for his opinion, but it is respectfully submitted that it is the correct one for the reason given above.

(11) If both marriages co-exist, are the incidents of the customary marriage extinguished by, or merged with, the incidents of the statutory marriage?

An affirmative answer was given to this question in Odive v. Obor[5] and Anor, where the learned trial Judge expressed the opinion that the incidents of the customary marriage merge with and are extinguished by the incidents of the statutory marriage. With respect, it is submitted that this contention is too wide. It is obvious that some incidents of the customary marriage are extinguished by the

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1. S. 35 Marriage Act, Cap 115, Laws of the Federation of Nigeria, 1958 Revision.
2. Ibid., s.48.
3. [1972] 2 E.C.S.L.R. 779.
4. Ibid., pp.782-783.
5. [1972] Suit No. O/5/1972, unreported, Onitsha High Court. An appeal against this decision on another ground was upheld by the Supreme Court, see Odive v. Obor [1974] 4 E.C.S.L.R. 398.

Marriage Act itself,[1] or some other statute.[2] Some incidents may be extinguished by the application of the repugnancy[3] or public policy rules[4]. For example, the right of the husband under customary law to marry further wives is extinguished by the Marriage Act itself. Similarly, a man's right to legitimize his bastard children by recognition, permitted under some systems of Nigerian customary law, is extinguished by the rule against public policy as laid down by judicial decisions.[5] But not all the incidents of a customary marriage are extinguished. Any incident of a customary marriage which does not conflict with an incident of statutory marriage remains unaffected and may be enforced by the appropriate court.

In the recent Swaziland case of Dladla v. Dlamini,[6] the effect of a marriage by civil rights upon a subsisting customary union was considered. The plaintiff husband had successfully instituted in the Swaziland National Court, an action for damages on the ground of his wife's adultery with the defendant. The parties had since 1950 been married under customary law, but the adultery was only committed after the parties were married according to civil rites. It was therefore contended that the Swazi court had no jurisdiction in view of the Swazi Courts Act 80 of 1950. The Court of Appeal, however, decided that there was in this case a "dual marriage", a civil marriage and a customary marriage,

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1. See e.g. Marriage Act, s.27 which provides that a statutory marriage can only be dissolved by a valid judgment of divorce.
2. See e.g. Matrimonial Causes Decree, 1970, ss.3(1) and 15.
3. For the repugnancy rule see above, Chapter II, pp. 182-189.
4. See the Evidence Act, Cap 62, Laws of the Federation of Nigeria, 1958 Revision, s.14(3); see also Cole v. Akinyele [1960] 5 F.S.C.84; Abisogun v. Abisogun and Ors.[1963] 1 All N.L.R. 237; Onwudinjoh v. Onwudinjoh [1957] 2 E.R.N.L.R.1; But see now, s.39(2) Constitution of the Federal Republic of Nigeria (Enactment) Decree, 1978, which provides that "No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth."
5. See cases in n.4, p.159.
6. [1977] Court of Appeal for Swaziland, 17 Feb. 1977, reported in C.I.L.S.A. July, 1977.

which were not mutually destructive and could stand side by side. Adultery was an injury done to the husband in either case; a plaintiff's claim could thus be based either on the marriage by Swazi law and custom, or on the civil rites marriage. By instituting the action for damages in the Swazi National Court, the plaintiff had clearly based his claim on the customary marriage, and the court had jurisdiction.

It is submitted that the position is the same in Nigeria, with regard to claims for damage for adultery.

(111) If the statutory marriage is dissolved by divorce what is the fate of the customary marriage?

It is submitted that a dissolution of the statutory marriage by divorce does not affect the customary marriage.[1] The arguments adduced in (1) above apply here also, but with greater force. In many systems of Nigerian customary law, a marriage can only be dissolved by the repayment of dowry, or a waiver of its repayment by the husband. Only a specific statutory provision, or the practice of the people, can change this law. It has been previously seen that generally, the repayment of dowry is still regarded by the people as the only means of ending a marriage, and there are no express statutory provisions dispensing with repayment. Therefore, in spite of a judicial decree dissolving the statutory marriage, it is submitted that the customary marriage and its incidents remain intact.

(IV) What is the position where the statutory marriage takes place in a foreign country?

A few old cases[2] in which the statutory marriage took place in a foreign country have engaged the attention of the Nigerian courts. There is no rational principle of law to be gleaned from the cases, and it is best to regard

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1. See Afonne v. Afonne [1973] Suit No. O/6D/73 unreported, Onitsha High Court.

2. See e.g. Asiata v. Goncallo [1900] 1 N.L.R. 42.

these decisions as limited to the peculiar facts of the particular cases.

In Ohochuku v. Ohochuku,[1] the parties were married under customary law in Nigeria, after which they went through another marriage ceremony at a register office in London. In a divorce suit instituted by the wife, expert evidence was given by the Hon. Dr. Elias, as to the nature of the Nigerian marriage. Wrangham, J., holding that he had no power under English law to dissolve the Nigerian marriage which was potentially polygynous, granted a decree for the dissolution of the marriage contracted in London. This decision has been the subject of confusion and controversy, much of it unjustified. For example, the Hon. Mr. Justice A.N. Aniagolu, criticizing Wrangham's J.'s decision to dissolve the English marriage, but not the Nigerian marriage, says:

> "For him to have so held meant that he regarded the second marriage in England as valid marriage over which he could entertain divorce proceedings. But if the Nigerian marriage was valid, then the second marriage solemnized in England could not be valid since the Nigerian marriage which was valid by the Nigerian Law, which was Ohochukus lex domicilii, was still subsisting. By holding that the second English marriage was a marriage, he was in effect saying that the Nigerian marriage was not a marriage for, by English law, the second marriage in England could not be valid without the demise of Ohochuku's Nigerian wife of the Nigerian marriage".[2]

Since the Nigerian Marriage Act permits the contract of a statutory marriage after a customary marriage, provided the parties to both marriages are the same, and the customary marriage is in fact monogamous, it is difficult to justify this assertion. It is submitted with the deepest respect, that the learned Judge (now Chief Justice of Imo State, Nigeria) misunderstood the facts of the case and mistakenly thought that the two marriages

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1. [1960] 1 All E.R. 253; [1960] 1 W.L.R.183; 104 Sol.Jo. 190.

2. See A.N. Aniagolu, "Aspects of Customary Marriage and Divorce and Their Incidents Upon Family Life", in African Indigenous Laws, op.cit.,p.96.

involved different women. This submission is reinforced by the fact that the learned Judge continued:

> "In fact, the Nigerian Law forbids a person to contract a marriage with a different woman, under the Act (the counterpart in Nigeria of the English marriage law), while his marriage under customary law is still subsisting".[1]

Both marriages contracted by Ohochuku were to the same woman, therefore this provision in the Nigerian Marriage Act is not relevant to the case. It was possible for the Ohochukus to contract a statutory marriage in Nigeria after the customary marriage.

Kasunmu and Salacuse[2] submit that Ohochuku's second marriage in London should be regarded as invalid by Nigerian Courts, on the ground that, since English law recognizes the customary marriage, and no provision for conversion exists in English law, the purported second ceremony of marriage would be a nullity in English law. They argue that once a marriage status has been created in English law, then any subsequent celebration of marriage between the same parties is a nullity. The learned writers conclude:

> "The marital status has already been created under customary law before the English registry marriage and one fails to see what effect the re-marriage has on their status".[3]

The simple answer to this proposition is that since the parties were domiciled in Nigeria, their marital status was governed by their lex domicilii. Had reference been made to Nigerian law for the incidents of the Ohochuku's status it would have been found that Nigerian law allowed the parties to superimpose a monogamous marriage on their customary law marriage. The second marriage automatically changes their legal status. The statutory marriage has the

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1. Ibid., p.96.
2. Kasunmu and Salacuse, Nigerian Family Law, op.cit., p.95-97.
3. Ibid., p.96.

effect of either curtailing or extending their marital obligations. For example, if there was no statutory marriage superimposed on the customary marriage, either party to the marriage could effect a divorce unilaterally, or both parties could mutually agree to a divorce. Once the second marriage, the statutory one, is contracted, however, no divorce may be effected unilaterally, or by mutual consent, without resort to a court of competent jurisdiction to grant a decree of divorce. Similarly, the husband's customary law right to take additional wives during the subsistence of the customary marriage is lost, once the statutory marriage is superimposed.[1] This is not the case where double marriages are contracted under the English Marriage Act between the same parties. Here, their marital legal status remains the same. The second marriage is therefore superfluous, and has no legal effect - a nullity. Such a situation would also result where double marriages between the same parties are celebrated under the Nigerian Marriage Act.[2]

The position in Ohochuku's case and similar cases is quite different from the English cases of Hampson v. Hampson[3] and Thynne v. Thynne,[4] cited by Kasunmu and Salacuse in support of their submission. In the English cases the parties were domiciled in England, both marriages were monogamous, and both marriages were celebrated under English law. The second ceremony in these two cases, therefore, did not confer on the parties any rights not previously possessed, nor any additional duties or restrictions of rights.

Nigerian Courts generally treat a marriage celebrated under English law (or any monogamous marriage celebrated abroad), as similar to a marriage celebrated under

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1. Nigerian Marriage Act, Cap 115, Laws of the Federation of Nigeria, 1958, section 27; Matrimonial Causes Decree 1970, No. 18 of 1970, s.3(1)(a).
2. See the case of Uwakwe v. Uwakwe [1971] Suit No. HU/15M/71, unreported decision of Umuhia High Court - above, p.139.
3. [1908] P.355.
4. [1955] P.272.

the Nigerian Marriage Act, for many purposes, for example, divorce. In Oshodi v. Oshodi,[1] the petitioner petitioned for a divorce on the grounds of cruelty and adultery with one Sikiratu Elemoro, the woman-named. The respondent, a practising Moslem, denied the allegations of cruelty, and averred that the woman-named had been married to him in 1954, under Yoruba Islamic Law and Custom, to the knowledge of the petitioner, and before the petitioner was married to him under Yoruba native law and custom. He further contended that the marriage between him and the petitioner in England, in 1956, under the Marriage Act of England, was a nullity, and therefore, the petitioner was not entitled to the reliefs sought in her petition. Caxton-Martins, Ag.J., held that the marriage in 1954 between the respondent and the woman named, and the marriage in 1955 between the respondent and the petitioner, were both valid polygamous marriages which the law of Nigeria allowed to run side by side, but that the marriage of 1956 under the Marriage Act of England, between the respondent and the petitioner, was an attempt to superimpose a monogamous marriage upon a polygamous marriage, and so was a nullity. It was held obiter, that if the petitioner and the respondent had attempted in 1956 to get married in Nigeria under the Marriage Act, a caveat might have been successfully lodged because of the valid marriage still existing between the respondent and the woman named.

It is therefore clear that, if a marriage would be legally valid if celebrated in Nigeria, it would also be regarded as legally valid if celebrated under English law, provided the parties are domiciled in Nigeria. But if such a marriage would not have been valid under Nigerian law, its celebration in England would not render it valid in Nigerian law. In other words, it is Nigerian law which decides the capacity of parties domiciled here to contract marriage, and the forms the marriage can take.

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1. [1963] 2 All N.L.R. 214.

(11) The validity of a customary marriage subsequent to a statutory marriage between the same parties

It has been seen that once a marriage has been contracted under the Marriage Act, no further customary marriage is legally possible during the subsistence of the statutory marriage, whether the parties are the same or not.[1]

The validity of a customary marriage celebrated subsequent to a statutory marriage, has not engaged the attention of the courts, possibly because most people marry under customary law, before contracting a marriage under the Marriage Act. In fact, very few people realise that a subsequent customary marriage after the celebration of a statutory marriage is not only void, but is also illegal under section 35 of the Marriage Act.[2]

An interesting legal complication may arise from this provision. There is a modern tendency to regard a customary marriage as a preliminary step to the celebration of a statutory marriage, especially among some Igbo communities, for example Onitsha. Cohabitation is therefore postponed until after the celebration of the statutory marriage, and the parties are not regarded as legally married until after the statutory marriage has been performed. The postponement of cohabitation, however, can have a legal effect unforeseen by the parties. It has been seen that in the case of Osamwonyi v. Osamwonyi,[3] the Supreme Court held that cohabitation is essential to the validity of a marriage under Benin customary law, and that a customary marriage is only legally contracted when the parties have cohabited.[4] Where cohabitation between the parties to a customary marriage is postponed until after the statutory marriage, the customary marriage, which is

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1. See further, above, p.133.
2. The fact was evident from investigations during field-work.
3. [1972] U.I.L.R., 527.
4. See further above, Chapter VI, pp.530 et al.

effected only after such cohabitation, is subsequent to the statutory marriage, and consequently it is void under section 35 of the Marriage Act which provides that a customary marriage subsequent to a statutory marriage is invalid and illegal.

Similarly, where parties for one reason or the other (usually in defiance of their parents' wishes) marry under the Act, and then (when the parents have given their consents), marry under customary law such customary marriages are not only invalid, but are illegal and incur a penalty.[1]

Summary of Significant Innovations Introduced by Statutory Marriage

The historical origin and nature of statutory marriage, as well as some of the conflicts produced by its introduction into the Nigerian legal system, have been examined above. The ground has therefore been laid for an appraisal of the changes brought by the Marriage Act and other statutory provisions derived from English or other foreign laws, on the legal status of Nigerian women.

It would be helpful to tabulate briefly the innovations introduced by these foreign laws, before dealing in detail with some of the most important changes. The greater equality of legal status of men and women in marriage and family life is perhaps the most profound change. The introduction of modern English law into Nigeria affected women's status in traditional society which was previously intricately interwoven with certain social and legal factors such as patriarchal rule, perpetual male tutelage,[2] polygyny, the dowry system, arranged marriages, denial of proprietory capacity, and deprivation of rights of succession.

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1. See Onuorah v. Onuorah [1972] Suit No. E/27D/72, unreported, Enugu High Court; Wachuku v. Wachuku, [1970] Suit No. 1/108/70, unreported, Ibadan High Court, 30 July, 1970.
2. See the South African Case Mashinini v. Mashinini [1947] N.A.C.91, where it was held that the principle that regardless of age and marital condition, a married woman is always under the guardianship of some man goes to the very root of customary law.

Some of the most important changes are inherent in the following:-

(1) the legal obligation of monogamy, already discussed above;

(11) the individualization of the marriage contract, by the provision dispensing with the consent of parents or other legal guardians, once a woman has attained the age of twenty-one, or is a widow under that age;

(111) the changes introduced in the rules governing the capacity of persons to marry each other, for example, rules of consanguinty, religion, status etc;

(IV) the obstacles placed on the freedom of divorce, by the provision of specific grounds for divorce, and the elaborate procedure which has to be adopted for gaining a divorce;

(V) the maintenance and other rights granted to divorced women after the termination of marriage, rights unknown to customary or Islamic law;

(VI) the introduction of different rules for the affiliation of children;

(VII) the introduction of rules ousting the almost exclusive right of custody which customary law (but not Islamic law) generally gives to the husband and his family.

(VIII) the introduction of a different system of succession to property, which, contrary to customary and Islamic laws, favours the widow and children of a deceased intestate husband, to the detriment of his extended family; a married woman's right to own, and to dispose of her self acquired, property was also entrenched;

(IX) the absence of any provision which compels a widow to marry another member of her deceased husband's family, or to remain married to her deceased husband, against her wishes;

(X) the absence of any legal requirement that a dowry or sadak is payable by the bridegroom to the bride or her parents;

(XI) the provision of legal machinery to enforce the rights and obligations;

(XII) the introduction of an action for damages for the breach of a promise to marry (such an action is unknown to customary and Islamic laws).

These are the principal changes which the introduction of English law and statutory marriage effected on the legal status of women who married under the Nigerian Marriage Act.

The changes in the proprietory rights of women will be examined later. Some of the changes enumerated above will be examined in this chapter, and others in the next chapter.

5. Changes in the status of women in relation to the formation of marriage

A. Consents to marriage

(1) Parental consents

It has been seen that in both customary, and Islamic law marriages, the consent of a woman's parents or other legal guardian is absolutely necessary.[1] Indeed, without such consent, the dowry, a legal essential of a customary marriage, cannot be paid. Under the Marriage Act, however, once a woman is twenty-one years old, or she has become a widow before that age, no consent is necessary for the validity of her marriage, and she can marry without such consent being given.[2]

The consent required under the Act for a woman who is not a widow, and is under twenty-one years, is the written consent of her father, or if he be dead or of unsound mind, or absent from Nigeria, the consent of her mother. If neither parent is capable of giving consent, the legal guardian of the woman can give the required consent.[3] If there is no parent or guardian capable of

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1. See above Chapter V and Chapter IX.
2. See Marriage Act, Cap 115, Laws of the Federation of Nigeria, 1958 s. 18.
3. Ibid.,s.18.

giving consent, a Governor, a judge of the High Court of the State, or an administrative officer may give the requisite consent.[1] This provision is important in that, if the father is not capable of giving consent, the mother's consent is preferred to that of any other male relative. In customary and Islamic law, in the absence of the father, the consent of a male relative is always necessary,[2] and generally, the mother's consent is legally unimportant.

Another point which should be noted with reference to consent under the Act is that, although a penalty of two years imprisonment is imposed on any person who marries, or assists, or procures any other person to marry a minor, the marriage of a minor, once celebrated is not rendered invalid by the lack of parental consent.[3]

In Agbo v. Udo[4] the plaintiff, who was married under the Marriage Act, brought an action for damages against the respondent on the ground of the latter's adultery with his wife. The respondent submitted that the petitioner's marriage was invalid on the grounds that at the time of the marriage, the wife was a minor who had been married without the consent of her father as required by the Act. Consequently, there was no valid marriage which could give rise to a claim for damages for adultery. Abbott, J., rejecting this contention, held that notwithstanding the absence of consent of the father, the marriage was valid within the meaning of the Marriage Act, by the operation of subsection (3) of section 33 thereof. The respondent was found liable for damages.

It should also be noted that a widow needs no consent for a marriage under the Act. A widow under a customary law marriage is also a widow within the provision

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1. Ibid., s.20.
2. In Islamic law the father may by will appoint an executor to be the legal guardian of his daughter.
3. This is by virtue of s.33(3) of the Marriage Act.
4. [1947] 18 N.L.R. 152.

of the statute.[1] A woman, therefore, who had been married as a child, under customary law, and whose husband subsequently dies, could contract a marriage under the Act, without parental consent, at any age.

In view of recent suggestions that the age at which Nigerian women need parental consent for a statutory marriage should, following England, be reduced from twenty-one to eighteen years; it may be interesting to consider briefly why the age of twenty-one was chosen for, and retained in, the Marriage Act.

Justice Jackson, probably following English law at that time, had proposed in his draft Ordinance that parental consent should be given for the marriage of minors under the age of twenty-one years. But his proposal was criticized, especially by missionaries, who thought the age for the marriage of girls should be lower than twenty-one. The reasons for advocating the dispensation of parental consent for the marriage of girls below the age of twenty-one can be seen from two letters criticizing the proposal.

Reverend P. Lonapre of the Roman Catholic Church, Lagos wrote:

> "As early marriages are the rule in at least this part of the colony I would say the age required by this section be changed from 21 to 17 in the case of females, and this in order to check in some degree the progress of concubinage, which unhappily but too much prevails in the colony".[2]

The reasons given by Chief Justice Marshall are more explicit:

> "In this country persons usually marry at an earlier age than in England, and to make it illegal to marry before 21 without the consent written or unwritten of the parent (whether father or mother) or

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1. See S.18 of Marriage Act, Cap.115, Laws of the Federation of Nigeria, 1958 Revision; "If either party to an intended marriage not being a widower or widow, is under twenty-one years of age, the written consent of the father, or if he be dead or of unsound mind or absent from Nigeria, of the mother, or if both be dead or of unsound mind or absent from Nigeria, of the guardian of such party, must be produced annexed to such affidavit as aforesaid before a licence can be granted or a certificate issued".
2. See letter dated 26 March, 1879, enclosure in

footnote 2 continued.....

> still more of the guardian (whoever that may mean, for the term is not defined) would place an arbitrary power in the hands of those persons who could often be most injurious and improper. Parents might extort large dowries before they would consent to a daughter's marriage. Pagan and Mohammedan parents might make it impossible for their children, if Christians, to marry on account of their being such. In a Christian and civilized country this authority is rightly given to parents, but here, I think, it would often operate for the satisfaction of malice and extortion. If it is considered necessary to make any such enactment, I would recommend that the age be 16 instead of 21".[1]

Similar reasons were given, and various ages proposed by other writers, including Lord Derby, who recommended 18 years, but who also thought that the opinions of those with local knowledge and experience should be obtained.[2]

Governor Rowe, in his reply to Lord Derby's recommendations, reported that "the age of minority had been left at twenty-one for Natives, in accordance with the unanimous opinion of the Executive Council of the Gold Coast Colony".[3] This seems to be due to the fact as stated by Quayle Jones, Queen's Advocate, that men in the Colony "rarely or never marry before they attain that age and that women do not marry at all without the consent of their parents".[4]

The present writer analysed 588 statutory marriage certificates recorded at the Local Government Office in Onitsha for 1976, and 512 statutory marriages contracted at Lagos Registry Office from 11 January to 31 July, 1975. Of the marriages recorded at Onitsha, 132 women (22.4 percent) needed parental consent. Only 37 (8.9 percent) of the Lagos brides married below the age of 21 years and thus needed parental consent. Not one of the bridegrooms was below the age of 21 years.

Footnote 2 continued..... Dispatch No. 441, of 18 September, 1882 - C.O. 879-20-216, p.30.

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1. See "Suggestions on the Proposed Marriage Ordinance, dated 19.4.79 C.O. 879/20-215, pp.28-29.
2. See Dispatch No. 122 dated 22 March,1883,para.19,section 3. C.O. 879-20-223/224, pp.45-47.
3. Dispatch 307,dated 27 August,1883,C.O.879-20-24,p.47.
4. Dispatch 216,dated 29 March,1884,enclosure No.2. C.O.879-20-230/231, p.59-60.

TABLE 10:1

AGES OF THE SPOUSES OF STATUTORY MARRIAGES AT THE TIME OF CELEBRATION OF MARRIAGE

Age at time of marriage	Lagos Registry 11 Jan - 31 July, 1975				Onitsha Registry, 1976			
	Women		Men		Women		Men	
	No.	%	No.	%	No.	%	No.	%
15 - 20 yrs.	37	8.9	-	-	132	22.4	-	-
21 - 25 "	285	69.2	73	17.8	412	70.1	108	18.4
26 - 30 "	90	21.9	200	48.5	44	7.5	272	46.3
31 - 35	-	-	112	27.2	-	-	163	27.7
36 - 40	-	-	3	.7	-	-	14	2.4
41 - 45	-	-	24	5.8	-	-	31	5.2
	412	100	412	100	588	100	588	100
Average Age	23.6		29.5		21.8		29.8	

SOURCES - compiled from The Counterfoils of marriage certificates, and the Marriage Registers of Lagos and Onitsha Registry Offices.

Table 10:1 shows that the pattern of the marriage age of bridegrooms has not changed for nearly a century. None of the 1000 bridegrooms named in the marriage certificates married below the age of twenty-one years, and very few of the brides needed parental consent for their marriages, thus indicating that they were twenty-one years or older at the time of the marriage.

It is interesting to note the numerical disparity in the Lagos marriages (mainly Yoruba) and the Onitsha marriages (mainly Igbos), of the women between the age-group 21-25 and 26-30. The majority of women 69.2 percent in Lagos and 70.1 percent in Onitsha were married between the ages of 21-25. Not one of the women was married after age 30. This seems to suggest that women over 30 years old do not contract statutory marriage, and if women do marry after that age, they usually marry under customary law. Second and subsequent marriages would therefore be contracted mainly according to customary law. Older men contracted statutory marriages in both communities.

Another interesting feature of the statistics is the relatively younger age at which the women married at Onitsha; 22.4 percent married between the ages of 15-20 compared with only 8.9 percent in the Lagos marriages. In the case of the men, the percentage of marriages contracted by each age group in the case of both Lagos and Onitsha is almost identical.

The findings of an examination of marriage certificates in respect of marriages celebrated between 1960-68 at the Ibadan Registry, in connection with research on "Family Law in Nigeria", conducted at the University of Ife, showed that both parties are usually over the age of twenty years at the time of marriage.[1]

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1. See A.B. Kasunmu, "Matrimonial Causes Decree, 1970: A Critical Assessment", Nig. J.C.L., Vol.2, No.1, 1971, pp.88-212 at p.113. See also Olusanya, "Socio-Economic Aspects of Rural-Urban Migration in Western Nigeria", op.cit.,pp.62-63; Olusanya, The Educational Factor in Human Fertility, op.cit.,p.360; the mean age of marriage for men is 25.8 years and for women 19.4 years.

As a result of these findings, there seems to be no need for a change in the law with respect to the age of parental consents for a statutory marriage, since in very few cases are such consents necessary.

(11) Consents of the parties to the marriage

Lack of consent of the parties to a marriage is not included as one of the factors which will invalidate a marriage under the Nigerian Marriage Act.[1] For the Canon Law (Common law), marriage is created by the consent of the parties. Consequently, if there is no consent, there is no valid marriage.[2] Consent is normally conclusively presumed from the celebration of the ceremony of marriage. In certain exceptional cases, however, the apparent consent may not be real. Thus, the validity of a marriage could be impugned on the ground that one of the parties to the marriage was intoxicated or insane at the time of the marriage, and as a result, was not aware of the true import of his actions.[3] Other factors which may vitiate consent were duress, fraud or mistake.

The lacuna in the Marriage Act has now been filled by the Matrimonial Causes Decree, 1970, which provides that a marriage which takes place after the commencement of the Decree is void where:

"(d) the consent of either of the parties is not a real consent because

(1) it was obtained by duress or fraud; or

(11) that party was mistaken as to the identity of the other party, or as to the nature of the ceremony performed; or

(111) that party is mentally incapable of understanding the nature of the marriage contract".

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1. See s.33(2) and 33(3); Agu v. Agu [1971] Suit No.E/5D/70, unreported, Enugu High Court.

2. See Maitland and Pollock, History of English Law, op. cit., Vol.2, p.368; D.Tolstoy,"Void and Voidable Marriages," 27 M.L.R. 1964,pp.385-394 at p.385; he argues that in all cases where a marriage is invalidated for want of consent, it is void, and not voidable; but see Joseph Jackson, The Formation and Annulment of Marriage, 2nd edit. (London: Butterworths, 1969), p.26.

3. See the dictum of Lord Stowell in Sullivan v. Sullivan [1812] 2 Hag.Con.

Consent of the parties to the marriage is a statutory requirement for the validity of the marriage and the consent must be real. What is real consent? Consent will not be real if it is induced by:

(1) duress or fraud

This principle was unsuccessfully invoked by the petitioner in Agu v. Agu,[1] who sought to have her marriage declared void, on the ground, inter alia, that when the said marriage took place, she was only fourteen years old, that she did not give her real consent to the marriage, did not understand the nature of the ceremony, and was crying throughout the ceremony. Although the petition was brought under the Matrimonial Causes Decree, 1970, the marriage, contracted before the Decree, was excluded from the invalidating provisions of the Decree.[2] Phil-Ebosie, J., noted this fact. He held that lack of consent, or consent obtained by duress or fraud did not invalidate a marriage under the Marriage Act. He referred to the fact that under English law (common law) the consents of both parties are necessary for a valid marriage, but held that "the burden of proof to impeach marriage on the ground of want of consent is heavier than in the case of impeaching a commercial contract" and stated that it was clear that the petitioner could not succeed on the ground of lack of consent.

It is respectfully submitted that the submission of the petitioner was correctly rejected by Phil-Ebosie, J., "Where a formal consent is brought about by force, menace or duress - a yielding of the lips, not of the mind - it is of no legal effect".[3] But public policy requires that marriages should not be lightly set aside, so that the

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1. [1971] Suit No. E/5D/70, unreported decision of Enugu High Court.
2. See the Matrimonial Causes Decree, 1970, Decree No. 18 of 1970, s.3(1).
3. Szetcher v. Szetcher [1971] P.286; Note: under the M.C.A. 1970, a void marriage is not devoid of legal effect, see section 69; see also Ford v. Stier [1896] P.1.

principles applied to invalidate a marriage are "strict and not to be rashly extended".[1] It is not unknown for brides to cry at their wedding, although they have consented to be married, but in many cases, the tears express joy. Uncorroborated evidence of crying by the bride is not enough to justify a decree of nullity.

For a party to succeed in invalidating a "marriage" on this ground, there must be proof of fear overriding the party's true intent.[2] The fear must be sufficiently grave, and it has been stated that there must be a threat of immediate danger to life, limb, or liberty,[3] arising from external circumstances but not necessarily[4] from acts of the other party. Thus, in Singh v. Singh,[5] an English case, the marriage was arranged by the bride's parents. Both husband and wife were Sikhs, and prior to the ceremony at a Register Office, the bride, who was seventeen years old, had never seen the bridegroom, but had been told by her parents that he was handsome and educated. She found him neither handsome, nor educated, and refused to consummate the marriage. Her petition for nullity of the marriage on the ground of duress failed, as there was no evidence that her will was overborne, or that her consent was obtained by force or fear. Her assertion that she only went through the ceremony out of a "proper respect" for her

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1. per Karminski, J., - H.v.H [1954] P.258, 267.
2. See Lee v. Lee [1928] 3 S.W.2d. 672; "shot-gun marriage" was held void because "if there had not been a wedding, there would have been a funeral"; see also Scott v. Sebright [1886] 12 P.D. 21, 23, 31, [1886] 3 T.L.R.79; and the Irish case of Griffith v. Griffith [1944] I.R.35; Cf. United States v. Rubenstein [1945] 151 Fed. Rep. (2nd ser.) 915: the marriage was held void where the primary object of the ceremony was to evade the immigration laws of the United States.
3. Szechter v. Szechter [1971] P.286; [1971] 2 W.L.R.170; [1970] 3 All E.R. 905.
4. Szechter v. Szechter [1971] P.286; Parojcic v. Parojcic [1958] 1 W.L.R.1280; Buckland v. Buckland [1968] P.296.
5. [1971] 2 All E.R. 828, C.A.; Cooper v. Crane [1891] P.369.

parents, and the tradition of her people, were not evidence of fear.

On the other hand, in H.v.H[1] the petitioner, a spinster aged 18 years, went through a ceremony of marriage with the respondent in Hungary in 1949, in order to obtain a foreign passport to enable her to leave the country. She stated that she was anxious, in view of the circumstances then prevailing, to leave her native country because of her fear of the danger to her life, liberty and virtue. She was able to escape from Hungary, and in due course presented a petition for nullity of marriage on the ground of alleged duress. Karminski, J., held that the petitioner's fears "were reasonably entertained" and were of such a kind as to negative her consent to the marriage, which was accordingly void. The petitioner was granted a decree of nullity. Similarly, in Buckland v. Buckland,[2] the petitioner, resident in Malta, was groundlessly charged with defiling the respondent, a girl of fifteen. Although he protested his innocence, he was twice advised that he stood no chance of acquittal, but would probably be given up to two years imprisonment, unless he married her. He did so. He was held entitled to a decree of nullity.

The decisions on duress are not consistent, and in the opinion of the English Law Commission, the courts in fact impose their own unarticulated test of social policy in defining the nature of duress which would suffice to vitiate the apparent consent of a party to a marriage. In their view, however, duress is not a matter in which legislative action is required:

> "Any attempt to define duress with the precision appropriate to a statute would, in our view, be likely to do more harm than good. We think that the courts can safely be left to deal with each case on its merits".[3]

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1. [1954] P.258; Scott v. Sebright [1886] 12 P.D.21; Hussein v. Hussein [1938] P.159; where the respondent threatened to murder the petitioner, a girl of eighteen, unless she married him.
2. [1968] P.296.
3. Law Commission, No. 33, 1970, Nullity of Marriage, para.66.

The principle of duress is of particular importance in the context of Nigerian social policy, with its tradition of forced marriages. It has been seen,[1] that parents often make a choice of spouse for their children, especially young girls, and exert varying degrees of pressure if their choice is not accepted. To what extent such pressures can be regarded as duress is a matter of fact for the courts. To protect the sanctity of marriage, allegations of duress must be strictly proved, but the courts ought not to disregard the social custom of the Nigerian peoples in any consideration of what constitutes duress in the Nigerian context.

Thus, in Aiyegbusi v. Aiyegbusi,[2] Odunlami, J., correctly, it is respectfully submitted, declared a marriage void on the ground that there was no real consent to the marriage on the part of the petitioner who adduced evidence showing that her father threatened to curse and punish her, if she refused to marry the respondent. Threats of a curse may produce great fear in an average Nigerian.

(11) Mental incapacity

Each party to a marriage must, at the time of its celebration, be capable of understanding the essential character of the marriage contract. It is apparent that a petitioner who proves that he was insane, or intoxicated to a high degree, at the time of the celebration of the marriage, will not usually have the mental capacity required for understanding the nature of the marriage contract. There are cases, however, where lack of mental capacity is less obvious. For example, is age a valid criterion of capacity to understand the responsibilities attaching to marriage? Normally, persons below a certain

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1. See above, Chapter V.
2. [1947] Suit No. 1/238/71 unreported decision of the High Court of the Western State, of 29 April, 1974, cited in Nigerian Law Journal, No. 9, 1975, Survey of Legal Developments in Nigeria, 1974.

age are incapable of contracting a valid statutory marriage. It will be seen that under the common law, a girl may be married at the age of twelve, and that this is probably the minimum age of marriage for girls in Nigeria.[1] Is a girl of twelve capable of understanding the essential nature of the marriage contract? The petitioner in Agu v. Agu[2] claimed that she did not understand the nature of the ceremony because of her tender age of fourteen. There are two aspects to such a claim. It could mean either:

(a) that she did not know it was a marriage she was contracting, a question of mistake as to the nature of the ceremony, which would definitely vitiate consent under the Matrimonial Causes Decree, 1970,[3] or

(b) that she did not appreciate the consequences or incidents of the marriage, which at the age of fourteen, in Nigeria, would be difficult to establish, although it may be possible at the age of eight or ten years.

In the case of In The Estate of Park,[4] a widower, aged seventy-eight years, made a will in favour of his second wife on the day of his marriage to her. Due to illness during the previous fifteen months, he had been in a very poor mental and physical condition on the wedding day, and in fact survived his wedding day by only eighteen days. Although the court declared against the will for lack of testamentary understanding, they upheld the validity of the marriage, which called for a different degree and kind of understanding, defined by the Court of Appeal as follows:

> "To ascertain the nature of the contract of marriage a person must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality it cannot be said that he or she understands the nature of the contract".

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1. See below, p.181.
2. [1971] Suit No. E/5D/70, unreported decision of Enugu High Court.
3. Section 3(1) (d) (11).
4. [1953] 2 All E.R.408, C.A.; [1954] P.89.

(111) Mistake

A marriage will be invalidated, if the petitioner proves that he or she was mistaken as to the identity of the other contracting party to the marriage, or as to the nature of the marriage ceremony. The principle of mistake as to the nature of the marriage ceremony was applied in Valier v. Valier,[1] where the husband, an Italian with poor knowledge of the English language, thought the usual ceremony of marriage he contracted in an English Registry Office was merely one of betrothal. The parties never cohabited, and the marriage was not consummated. It was held that he was entitled to a decree of nullity.

A marriage will not be invalidated by a mistake as to the monogamous nature of the union[2] or that one party mistakenly thought he was contracting a church marriage or a church blessing only, if all the essential ingredients of the Marriage Act have been complied with.

B. Capacity to marry

(1) The age of marriage

The Nigerian Marriage Act does not specify a minimum age of capacity to marry. In Agu v. Agu[3] it was held that, in view of this omission, the English Marriage Act, 1949, applied, by virtue of section 4 of the State Courts (Federal Jurisdiction) Act,[4] which provided for the application of English law on matrimonial causes (including the law on the age of marriage).[5] Under the English Marriage

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1. [1925] 133 L.T. 830; Kelly v. Kelly [1932] 49 T.L.R.99; Mehta v. Mehta [1945] 2 All E.R.690; Kassim v. Kassim [1962] p.224; Cf. Ford v. Stier [1896] p.1.
2. Uwakwe v. Uwakwe and Anor.[1971] Suit No. HU/15M/71 unreported, Umuahia High Court, see further above, p.139.
3. [1971] Suit No. E/5D/70, unreported, Enugu High Court.
4. Cap.177, Laws of the Federation of Nigeria 1958 Revision, formerly cited as The Regional Courts (Federal Jurisdiction) Act.
5. See Egwunwoke v. Egwunwoke [1966] N.M.L.R. 147; [1966] All N.L.R.1; Enekbe v. Enekbe [1964] N.M.L.R.42. See also Kasunmu and Salacuse, Nigerian Family Law, op.cit., pp.66. Contrast, Phillips, A Survey of African Marriage

footnote 5 continued....

Act 1949, both parties to the marriage must be sixteen years or above. Any marriage below this age is void.[1] Section 4 of the State Courts (Federal Jurisdiction) Act, however, has now been repealed by the Matrimonial Causes Decree, 1970,[2] which provides that a marriage should be void if either of the parties is not of marriageable age,[3] but fails to state what age is "marriageable age".

The general view[4] is, that in the absence of a statutory minimum age, recourse may be had to the common law rule on the subject, since the common law of England has been received into Nigerian law.[5] If this view is accepted, a valid marriage may be contracted if the parties have attained the age of puberty, recognised as fourteen years for a boy, and twelve years for a girl. Any marriage contracted before these ages is voidable, provided it is avoided by either party before that party reaches the age of puberty. But if the marriage is ratified (as it would presumably be by continued cohabitation after these ages, the marriage is rendered irrevocably binding.[6]

Table 10:1 above shows that the majority of women (83.1 percent) married at the age of twenty-one years or over, while not one of the men married below the age of twenty-one years. This would seem to indicate that a minimum marriage age of sixteen years with parental consent

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Footnote 5 continued..... and Family Life, op.cit., p.258; Arinze v. Arinze [1966] N.M.L.R. 155.

1. See the arguments advanced for and against making a marriage contracted under the minimum age voidable rather than void in the English Law Commission Report, No. 33, 1970, Nullity of Marriage, para.17.
2. No. 18 of 1970, ss.8 and 115(2)(d).
3. Matrimonial Causes Decree, 1970, No. 18 of 1970,s.(3)(1)(e).
4. See Adesanya, Laws of Matrimonial Causes, op.cit., p.149 Nwogugu, Family Law in Nigeria, op.cit., p.25; Phillips, Survey of African Marriage, op.cit.,p.258; Kasunmu and and Salacuse, Nigerian Family Law, op.cit., pp. 65-66.
5. See above, Chapter II, pp. 193-196.
6. See Bromley, Family Law, 1976, op.cit.,p.30.

and twenty-one years without parental consent would be adequate at the present time in Nigeria, and consequently there is no need to fix the minimum age below this.[1]

There is need, however, for a national minimum age of marriage which should be made to govern all marriages contracted in Nigeria. The present uncertainty as to the legal age of marriage in Nigeria is highly unsatisfactory.

(11) Consanguinity and affinity

It has been seen in the discussion on customary law marriages[2] that the prohibited degrees of consanguinity and affinity vary considerably among the various communities. While there are virtually no marriage restrictions among some groups in this respect, others prohibit inter-marriage by parties who are even distantly related. During the initial discussions on the Marriage Ordinance 1884, bars of consanguinity and affinity stimulated much controversy between those who wanted the prohibitions of English law to be enshrined in the Ordinance in their totality, regardless of local practices to the contrary, and those who thought that some notice should be taken of these practices, especially those not "repugnant to the teachings of scripture".[3]

The problem has always been, and today still remains, a delicate one, principally because of the wide variation in practice among the various systems of customary law. The problem is also compounded by the fact that Islamic law differs from customary law to some extent in this respect. For example, marriage of a man to the widow

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1. See above, Chapter V, p.381. There is evidence that the minimum age for customary marriage is rising in some parts of the country, due to enhanced educational and other opportunities for girls.

2. See above, Chapter V, pp.408-412.

3. See e.g. the opinion of Rev. A.W. Parker, who stated that marriage with a deceased wife's sister was not repugnant to the teachings of scripture and has been the law in Canada and Australia. See letter dated 24 May, 1879, enclosure 10 in Dispatch 441, dated 18 September, 1882 - C.O. 879-20-216/217, pp.30-32. For an interesting account of clerical opposition to such marriages in Uganda, see H.F. Morris, "Marriage Law in Uganda: Sixty

footnote 3 continued.....

of his father is absolutely forbidden by Islamic law, whereas it is permissible, and in some systems traditionally obligatory, in customary law.[1] To enact a law mutually acceptable to all groups is, therefore, a very difficult task.

In the draft submitted by Governor Rowe, the parties had to swear that there was "no impediment of kindred or alliance or any other hindrance either according to English law or native law or custom",[2] to their marriage. This provision, had it been accepted, would have been wide enough to accommodate the native population, since everyone would observe their own customary bars. It would have also accommodated the foreign population who would have been bound by the bars imposed by the law of England or other foreign country.

This provision, however, was criticized, chiefly by Chief Justice Marshall who, ever critical of the natives and of their forms of marriage, observed:

> "It [the draft] appears also to legalize all impediments of kindred or alliance or any other hindrances which exist according to native law or custom. Marriage among the natives allows of unlimited polygamy and can be dissolved at will. I cannot therefore understand why Europeans as well as natives should in Christian marriage be subjected to any prohibitions or hindrances which may exist among the heathen population".[3]

Footnote 3 continued.... Years of Attempted Reform", in Family Law in Asia and Africa", edit. J.N.D. Anderson, Marriage between a man and his deceased wife's sister was legalised in England in 1907 by the Deceased Wife's Sister Marriage Act, and in 1921, the Deceased Brother's Widow's Marriage Act legalised the marriage of a woman to her deceased husband's brother.

1. See further, above, Chapter III. p.438 et.al.

2. See Dispatch 200 dated 23 May, 1882, C.O. 879-20-204, pp.6-7. This Bill actually had a first reading in the Gold Coast Legislature before it was abandoned; see Appendix II above.

3. See the letter dated 6 July, 1882, written to the Under-Secretary of State, reporting the action previously taken in the Colony in the matter of the marriage law, and submitting observations on the proposed Ordinance - C.O.879-20-205/206, pp.8-10.

It is difficult to appreciate the reasoning of the learned Chief Justice, because Europeans are not usually bound by native law and custom,[1] and in this particular case the alternative bars in English law would have applied to them.

Ultimately the provision in the drafts of Justice Jackson and Mr. Woodcock, which was based on the law of England of the time in this respect, was adopted, with the single exception that a man was lawfully permitted to marry his deceased wife's sister or niece.[2] A man, therefore, could not marry his father's wife under the Marriage Act, even if the wife consented. This rule, as previously noted, is in accordance with Islamic law, but is against the rules of many customary law systems. On the other hand, first cousins who may contract a valid marriage under the Marriage Act, and also under Islamic law, are forbidden to do so by the customary law of many ethnic groups.[3]

The Matrimonial Causes Decree, 1970, has obviated the need to refer to English law with reference to prohibited degrees of consanguinity and affinity, as these are now set out in schedule I of the Decree.[4] The Decree has also ameliorated the position somewhat in regard to the prohibition of marriage by reason of affinity. Where two persons who are within the prohibited degrees of affinity wish to marry each other, they may now apply in writing to a judge for permission to do so. The judge must be satisfied that the circumstances of the particular case are so

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1. See Savage v. Macfoy [1909] R.G.L.R.504; Fonseca v. Passman [1958] W.R.N.L.R.41; and Re Bethell [1887] 38 Ch.D.220.
2. See Marriage Act, section 33(1). This section has now been amended by the Matrimonial Causes Decree, 1970, section 115(1).
3. e.g. some Yorubas, Igbos, Ibibios, Edos, Tivs.
4. The Matrimonial Causes Decree, 1970, has amended S.33(1) of the Marriage Act. The provision in the Marriage Act relating to consanguinity and affinity was repealed by the Matrimonial Causes Decree, and re-enacted with modifications in the Decree: s.3(2) Matrimonial Causes Decree.

exceptional as to justify giving his permission.[1]

With regard to consanguinity, a marriage which takes place after the commencement of the Decree is void if the parties are within the prohibited degrees of consanguinity.[2]

(111) Other bars to marriage

It has been seen[3] that some systems of customary law prohibit intermarriage with persons of a certain status, e.g. marriage of a free woman with a slave, or descendant of a slave. In Islamic Law, a Moslem woman may not marry a non-Moslem man, and a Moslem man is incapable of marrying a pagan woman, although he may marry a woman who is a Christian or a Hindu. Similarly, in Islamic law also, persons who are related by fosterage may not marry each other, if they would have been prohibited from doing so had the relationship been one of blood or half-blood. For example, a man may not marry his foster sister.[4] Under the Marriage Act,[5] and the Matrimonial Causes Decree 1970,[6] these marriages are legally permissible.

The Prohibition against persons of different religions intermarrying, is especially important, since there are many cases where this conflict arises, and the only solution is marriage under the Ordinance.[7]

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1. See Matrimonial Causes Decree, s.4.
2. Ibid., s.3(1)(b).
3. See above Chapter V, pp. 415-417.
4. See Ruxton, Maliki Law, op.cit.,p.145; Coulson, Succession in the Muslim Family, op.cit.,p.14; Fyzee, Outlines of Muhammadan Law, op.cit., p.106.
5. See above, pp. 182-183.
6. See Schedule 1, Matrimonial Causes Decree, 1970.
7. But see the Federal Republic of Nigeria (Enactment) Decree 1978, s.15, which provides for the encouragement of intermarriage. See further above, Chapter II, p.156.

(IV) Dowry (marriage consideration)

A marriage under the Nigerian Marriage Act is legally valid whether dowry, sadak, or other marriage consideration has been paid, or contracted for or not. Such payments are not essential to the legal validity of the marriage. Where, however, such payments are made, they do not render an otherwise valid marriage, invalid.

Dispensation from liability to pay dowry to the parents of the bride is a radical departure from customary and Islamic law marriages as practised in Nigeria. It strikes at the root of parental control over the marriages of their daughters. The requirement of parental consent for the marriage of persons under twenty-one years of age helps parents to retain some control over the marriage of minors, since consent can be withheld until a suitable dowry has been paid.

The pros and cons of, and varying attitudes to, the payment of dowry in Nigeria have already been discussed in an earlier chapter. It is worth noting here, however, that the payment of dowry sets the seal of parental and social approval on a statutory marriage, and women who have not contracted a customary marriage prior to the celebration of their statutory marriage, invariably insist that this payment should be made at a later date. Failure by the husband to pay the dowry often results in marital discord. The case of Onuorah v. Onuorah[1] has already been noted in this respect. Another interesting case which portrays the attitude of educated Nigerian women to customary law marriage, and the payment of dowry as an essential of such marriage is Wachuku v. Wachuku.[2] In this

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1. [1972] Suit No. E/27D/72, unreported decision of Enugu High Court. Some Churches refuse to celebrate a marriage without parental consent. In Ugboma v. Morah [1940] 15 N.L.R.78, a priest of the Church Missionary Society stated that "Church practice is to refuse to issue notices without the parents' consent, except where the parties are already married by a native marriage, or where they have children".
2. [1970] Suit No. 1/108/70, unreported decision of Ibadan High Court, delivered on 30 July, 1970. For other facts of this case see Chapter XI, p.205, for non-payment of

footnote 2 continued.....

case the wife petitioner was a medical practitioner of Yoruba origin, who met and married the respondent, an Igbo legal practitioner, in Dublin, in 1962. The parties lived in Dublin until the end of 1962, when the husband returned to Nigeria and set up legal practice in Aba. The wife, in her evidence, stated that it was agreed between the parties that the wife should return to Nigeria later, and the husband would then approach her parents for the celebration of a marriage according to Yoruba customary law. The wife returned to Nigeria in October 1963 and established a medical practice in Ibadan. The marriage ran into difficulties, and the wife petitioned for a divorce on the grounds, inter alia, of the refusal of the respondent to arrange for the celebration of the customary marriage as promised. Commenting on this aspect of the petition Aguda, J., said:

> "The other evidence led in support of the petition relates to the failure of the respondent to perform some ceremonies relating to the customary marriage...Apparently this failure weighed very heavily with the petitioner....In my view the evidence as to the failure of the respondent to perform some customary rites relating to the marriage is immaterial as it does not come for consideration under the Decree. The performance of such rites is an unnecessary appendage to a marriage under the Marriage Act often demanded by the women folk of this country who in some cases feel most unhappy, as the present petitioner apparently is, if this unnecessary appendage is not added to a ceremony of marriage which by itself is self-sufficient".

These and similar cases, illustrate the degree of importance which is still attached to customary marriage in contemporary Nigerian societies. The Nigerians' attitude towards the two types of marriage elicited the following comment from Okagbue, J.,

> "...the generality of Nigerians do not think that marriage under the Act is a superior form of marriage. There is no denying the fact that, among

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Footnote 2 continued..... dowry contributing to marital discord; see also Arinye v. Arinye [1973] C.C.H.C.J.81; wife baptised children of statutory marriage in her brother's name because, "my husband did not pay any dowry on me according to our custom..." p.86.

> the so-called educated classes marriage under the Act has some snub or prestige value, but these same people, especially the women, would immediately resent any attempt to do away with the traditional marriage form. Shades of Savigny".[1]

The attitude of the average Nigerian to customary marriage belies the assertion of Chief Justice Jackson made more than a century earlier, and which has been noted in an earlier chapter,[2] that the Missionaries, by education, example and other means, have been able "with great success" to persuade the "Natives" to become Christians, and to discard customary marriage which the Missionaries and the Chief Justice regarded as mere concubinage.

(V) Breach of promise of marriage

Damages may be awarded for a breach of a promise to contract a statutory marriage.[3] It has been seen that the award of damages for breach of a promise to marry is not a traditional feature of either customary[4] or Islamic law.[5] Its introduction into Nigerian marriage laws is another innovation due to the introduction of statutory marriage and English law.

Under the common law, an agreement to marry is a contract provided the parties intended to create legal relations. It is a peculiar kind of contract, and consists of the mutual promises of the parties to marry, which promise is fulfilled once the marriage ceremony has been performed. But in Kremezi v. Ridgway,[6] Hilbery, J., held:

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1. R.O. Okagbue, "The Marriage Dilemma", in African Indigenous Laws, edit. by T.O. Elias, et.al.,op.cit.,p.182.
2. See above, Chapter, III, p.202.
3. See Uso v. Iketubosin [1957] W.R.N.L.R.186; Ugboma v. Morah [1940] 15 N.L.R.78.
4. Ugboma v. Morah [1940] 15 N.L.R.78; see Ajisafe, Law and Customs of the Yorubas, op.cit.,p.73 "Should a man promise to marry a girl and afterwards breaks his promise, the girl cannot afterwards claim damages for breach of promise. She can only slang and abuse him. She is however entitled to recover anything in the shape of presents, gifts, or keep-sakes in the possession of the man"; Kasunmu and Salacuse, op.cit., p.44. Cf.Allott, "Marriage and Internal Conflict of Laws in Ghana," op.cit., p.223.

footnotes 5 and 6 continued.....

> "...the exchange of mutual promises to marry ends, so far as legal enforcement is concerned, on the performance of the marriage ceremony, none the less the performance which the parties contemplated at the time they exchanged mutual promises is not exhausted by the performance of a mere ceremony. I am quite sure that no young woman, when she accepts a proposal of marriage and a contract is formed, would be satisfied if she were told that all the young man is undertaking by the promise is to go through a form or ceremony with her. What the parties intend is an exchange of mutual promises to become one another's spouses - to become husband and wife with all that that should entail".

From this statement it is evident that damages for breach of contract to marry are recoverable, not only if the marriage is not celebrated due to the fault of one party to the contract, but also when one party, after the ceremony of marriage, fails to fulfil all that being married entails. Consequently, damages may be recoverable for loss of status the wife may have had if the contract had been fully performed.[1]

The rules governing actions for breach of contract to marry, generally speaking, are not very different to those which pertain to commercial contracts. The parties may include various conditions and terms in their contract, provided that such terms and conditions are legal. Thus in Smith v. Osemaka,[2] the defendant's promise to marry the plaintiff, conditional on her becoming pregnant for him, was held by Kassim,J., to be an agreement to have sexual intercourse before marriage, and therefore contrary to public poligy. The agreement was accordingly declared void.

Footnotes 5 and 6 continued....

5. See Mst.Zainaba v. Rahman [1945] A.I.R. Peshawar, 51 - a mere betrothal does not create any rights in Muhammadan law.
6. [1949] 1 All E.R.662 at p.664.

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1. See Berry v. Da Costa [1866] L.R.I.C.P.331; cf.Dunhill v. Wallrock [1951] 95 S.J.451, where the Court of Appeal ordered a new trial of a breach of promise action after a jury had awarded £20,000 to a plaintiff, observing that the "jury were not called on to impose a fine on the defendant".
2. [1963] Suit No. E/17/63, unreported, Enugu High Court; See also Spiers v. Hunt [1908] 1K.B.720.

Where the promise to marry is made subject to a condition precedent, there can be no breach until the condition is fulfilled. In Aiyede v. Norman-Williams,[1] the parties agreed to marry each other, when they were students in England and Ireland. The defendant made his promise conditional on obtaining his father's consent to the marriage. He wrote to his father requesting his consent to the proposed marriage. His father refused to give his consent. The defendant later married another woman, and the plaintiff sued him for breach of his promise to marry her. Coker, J., held that the condition precedent attached to the marriage proposal had not been fulfilled. The action was dismissed.

In a breach of promise action, corroboration of the plaintiff's evidence of the promise to marry is required,[2] but there is no legal provision that "the promise must be made in the presence of witnesses or that there must have been an eye-witness or a formal introduction to the parents".[3] With regard to parental consent for an agreement to marry, Kasunmu and Salacuse note:

> "Since parental consent is such an important factor in arranging marriages in Nigeria, one wonders whether the Nigerian courts ought not to infer such a condition where the family life, social background and conduct of the parties warrant, even though it was not expressly stated by the parties at the time they made their agreement".[4]

It is submitted that the duty of the courts is not to make contracts for the parties or to legislate; the insertion of such a term into the contract would amount to an unwarranted interference with the freedom of the parties to make their own contract. Interference in this manner is

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1. [1960] L.L.R. 253.
2. Olusanya v. Florence Iba Diaran [1971] U.I.L.R.149.
3. Ibid. cf. the two decisions of the English Court of Appeal in Bessela v. Stern [1877] 2 C.P.D.265; and Wiedman v. Walpole [1891] 2 Q.B. 534, C.A.
4. Kasunmu and Salacuse, op.cit., p.36.

unjustified, especially since an infant under the age of twenty-one years cannot be sued for breach of promise to contract a statutory marriage.[1] It is therefore clear that liability for damages only attaches to persons of full legal age[2] who do not need parental consent to contract a statutory marriage.

The defendant in a breach of promise action can raise any of the defences available in other breach of contract cases, such as infancy,[3] fraud,[4] misrepresentation, mistake,[5] or character,[6] of the plaintiff.

Jurisdiction

The fact that there is a division of jurisdiction with reference to marriage in Nigeria has already been noted. Generally, Customary Courts have jurisdiction in matters relating to customary marriage, and the High Courts have jurisdiction relating to statutory marriage. Thus the High Court Law of the former Western Region of Nigeria provides:

> "...except in so far as the Governor may by Order in Council otherwise direct and except in suits transferred to the High Court under the provisions of section 28 of the Native Courts Ordinance, the High Court shall not exercise original jurisdiction in any matter which is subject to the jurisdiction of a customary court relating to marriage, family status, guardianship of children and inheritance or disposition of property on death.

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1. A promise to marry made during infancy is not binding; nor is a mere ratification of it made after twenty-one years. Infant Relief Act, 1874, s.2; see Hale v. Ruthven [1869] 20 L.T.404 where Mellor, J., thought "the point too clear to give leave to move upon"; Coxhead v. Mullis [1878] 3 C.P.D. 439.
2. A person comes of age on the day before his twenty-first birthday - Re Shurey [1918] 1 Ch.263.
3. See the Infants Relief Act, 1874, s.1. which is a statute of general application in Nigeria: Labinjo v. Abake [1924] 5 N.L.R.33.
4. Wharton v. Lewis [1824] 1 Car. & P.529.
5. See Bench v. Merrick [1844] 1 Car. and Kir. 463, where it was held that rescission was justified when the defendant learnt that the plaintiff had been unchaste ten years before, even though her conduct since had

footnotes 5 and 6 continued.....

(2) The jurisdiction of the High Court shall include such jurisdiction as may be vested in it by Federal law.[1]

Similarly, the High Court Law of the former Northern Region states that the High Court shall not exercise original jurisdiction in any suit or matter which is "subject to the jurisdiction of a native court relating to marriage, family status, guardianship of children, inheritance or the disposition of property on death".[2] From these provisions it is clear that actions involving promises to contract a customary marriage[3] must be brought in a Customary Court, since obviously they relate to marriage.

The question remains however as to which courts have jurisdiction over breach of a promise to contract a statutory marriage, and which law, customary or common law, applies. With regard to the first question the general view is that the action must be brought in a non-Customary Court, - a Magistrate or High Court depending on the quantum of damages claimed. This is because an action for breach of contract to marry is unknown to customary law, and damages are not awarded for a breach of promise to marry under customary law.[4] It is therefore necessary to

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Footnotes 5 and 6 continued.....

5. .. been perfectly correct; see also Irving v. Greenwood [1824] 1 C. and P.300.
6. Baddeley v. Mortlock [1816] Holt N.P. 151.

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1. Proviso to s.9(1) High Court Law, Cap.44, Laws of the Western Region of Nigeria, 1959 Revision.
2. S.17(1)(b), Cap 49, Laws of the Northern Region of Nigeria 1963 Revision. See also High Court Law, Cap. Laws of Bendel State, 1976 Revision, s.10(2); Magistrates Court Law (Western Region) 1955, s.19(4); where there is no Customary Court to exercise original jurisdiction in a State, the High Court, or Magistrates' Court in the State may be vested with original jurisdiction; see High Court Law (Amendment) Edict 1974, s.3; Magistrates' Court Law (Amendment) Edict 1971, s.5; Solomon v. Gbobo [1974] 4 E.C.S.L.R. 457.
3. Such actions may be brought by a father or legal guardian of a girl who has been seduced by a man who promised to marry her under customary law, and as a result the girl becomes pregnant; see Nkumatolu Nwagu v. Ezienyi [1970] Suit No. ME/52/70, unreported, Enugu Magistrates Court, 17 Dec. 1970, where a father was awarded £60 damages for the seduction and loss of services of his daughter.

footnote 4 continued.....

distinguish clearly the type of marriage to which the promise refers. In Olusanya v. Florence Ibadiaran,[1] the plaintiff claimed from the defendant special and general damages for the breach of her oral promise of marriage. In the court below, evidence was led to show that the defendant promised to marry the plaintiff "according to the tenets of the Catholic Church", and in pursuance of this promise, he spent various amounts on behalf of the defendant. The defendant denied the alleged promise. The Magistrate held that the defendant committed a breach of the agreement to marry and awarded damages accordingly. On appeal, the High Court held that it was essential to prove whether the plaintiff was a Catholic, to show what type of marriage the plaintiff actually intended, since the Magistrates Court had no jurisdiction if the promise was not to marry under the Marriage Act. It is respectfully submitted that proof that the plaintiff was a Catholic would not be conclusive evidence of an intention to contract a marriage under the Marriage Act, since there are numerous Catholics who marry only according to customary law.[2]

It should be noted that in Olusanya v. Florence Ibadiaran,[3] the plaintiff was the man who was suing for damages for breach of promise of the woman to marry him, instead of the other way round, which is more usual in Nigeria.[4]

Footnote 4 continued.

4. See Ugboma v. Morah [1940] 15 N.L.R.78; and Olusanya v. Florence Ibadiaran [1971] 1 U.I.L.R.149; see also Obi, Modern Family Law, op.cit., pp.122-123.

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1. [1971] 1 U.I.L.R. 149.
2. Some spouses obtain a church blessing of their customary law marriage, see Anyaegbunam v. Anyaegbunam [1973] 3 E.C.S.L.R.43, where the respondent alleged that the marriage was a oustomary marriage followed by a church blessing; see also Anyaegbunam v. Anyaegbunam [1973] 4 S.C.121; and Ilechukwu v. Ilechukwu and Anor.[1977] Suit No. ME/59/77, unreported, Enugu Magistrates Court - the parties contracted a customary marriage which was blessed at Immanuel Catholic Church, Aguata.
3. [1971] 1 I.U.L.R. 149.
4. See Obi, Modern Family Law, op.cit.,p.122 who asserts: "A man too can sue; [for breach of promise to marry] but he seldom ever does, probably because he would find it more difficult to prove damage than would a woman".

Once it is decided that the parties intended to contract a statutory marriage, the common law should apply. The various High Court Laws provide:

> (3) No party shall be entitled to claim the benefit of any customary law, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be exclusively regulated otherwise than by customary law or that such transactions are transactions unknown to customary law.[1]

Since a marriage under the Nigerian Marriage Act or other monogamous marriage, as well as agreements relating thereto are unknown to customary law, the application of customary law is ruled out.

The quantum of damages recoverable

Damages are recoverable for a breach of promise to marry. Damages may be general and special, and may be awarded for injured feelings,[2] wounded pride and humiliation suffered as a result of the breach.[3] In Uso v. Iketubosin,[4] the court refused to award special damages on the ground that the gifts claimed were voluntarily made by the plaintiff to the defendant as a mark of affection. The plaintiff was awarded generally damages of £600, the court having taken into account the fact that she was then thirty years old, and had been tied to the defendant "when her prospects for marriage were greatest", her station in life and other circumstances. This decision may be compared with

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1. High Court Law.
2. See Ugboma v. Morah [1940] 15 N.L.R.78, 81, - "judging from the plaintiff's bearing in the witness box, the injury has not gone very far", per Waddington, Asst.J. and Smith v. Osamaka (supra) where it was held that disappointment to the plaintiff, a requisite for success in an action for breach of promise, was negatived by the plaintiff's conduct in importuning the defendant to take her with him and his mistress on a Christmas holiday.
3. Berry v. Da Costa [1866] L.R.1 C.P. 331; Ugboma v. Morah [1940] 15 N.L.R. 78.
4. [1957] W.R.N.L.R. 186; cf. Cohen v. Sellar [1926] 1 K.B. 536.

Ugboma v. Morah[1] where it was held that there was no "wastage" as the plaintiff was still young.[2] In assessing damages in this case, Waddington, Asst. J., took into account the fact that in the customs into which both the plaintiff and defendant were born "there is no conception in the least comparable to that of damages for breach of promise of marriage". As a result the quantum of damages was reduced. This decision has been criticised on the ground that refusal of the full remedy provided by English law merely because there is no comparable remedy in customary law is unjustified [3] and contrary to the various statutes which direct how and when English common law shall be applied.

It is respectfully submitted that the award of damages is within the discretion of the court, provided the discretion is exercised judicially. There is no statute, or other law, which prohibits a judge from taking into account the social background of the parties, or the custom of the people in assessing the quantum of damages to be awarded.[4] The fact that the plaintiff could not have claimed damages under the customary law of the parties is relevant in assessing the level of damages that should be rewarded. Breach of promise to marry is not seriously regarded in customary law unless accompanied by seduction which results in the birth of a child.[5] Mere refusal to

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1. [1940] 15 N.L.R. 78.
2. The plaintiff was 26 years old, and had maintained a friendship with the defendant since she was 15 and he 17 years old.
3. See Kasunmu and Salacuse, Nigerian Family Law, op.cit.,p.38.
4. See the East African case of Kasansula v. Rai Singh and Anor., see [1963] J.A.L. 57 where in assessing damages for death due to the negligence of the defendant, Sheridan J. took judicial notice of the fact that African children who are educated, often at considerable parental sacrifice, are expected to contribute towards the support of such parents in return for the benefits received. See James S. Read "Uganda, Nyasaland, Kenya: - When is Customary Law Relevant?" J.A.L. 1963, p.57.
5. If an unmarried woman who is seduced, becomes pregnant as a result, and the seducer refuses to marry her, the father of the girl or other legal guardian may claim compensation from the seducer for the wrong. Damages awarded may take into account loss of prospects of marriage, cost of her education etc. see Nkumatolu Nwagu v. Ezienji [1970] Suit

footnote 5 continued....

fulfil a promise to marry invariably results in no great loss to the woman in traditional society, since it was relatively easy to find another husband, wives always being in great demand.

6. Celebration of Marriage

A. Introduction

The introduction of statutory marriage in Nigeria effected significant changes in the procedure for the celebration of a valid marriage. Compulsory registration and the observation of certain formalities are essential to the legal validity of a statutory marriage. Ignorance of the legal requirements of procedure can have unfortunate consequences, especially for women.

Usually, procedural details of a marriage are entrusted to the husband, who is expected to make all the necessary arrangements. Ignorance, inadvertence, or deliberate intention to deceive on the part of the husband, may result in failure to observe the correct procedure. The facts in Martins v. Adenugba[1] have all the elements of the Bertha Clay novel, "Irene's Vow",[2] and portray deliberate deceit. The parties were engaged to be married, and agreed on a registry marriage. On the appointed day,

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Footnote 5 continued.... No. ME/52/70, unreported decision of Enugu Magistrates Court of 17 Dec. 1970, where £60 was awarded to plaintiff whose daughter had been seduced by the defendant, and had become pregnant.

1. [1946] 18 N.L.R. 63.

2. In the novel "Irene's Vow" an innocent girl was led to believe that she was married to an English Earl. The latter procured his friend who pretended to be a priest and conducted a ceremony of marriage between the Earl and the girl. In the belief that she was legally married the girl cohabited secretly with the Earl, and only discovered the fraud when she read of the Earl's marriage to a girl of his own class. She vowed revenge on both of them for the wrong done to her, and after many years by a series of remarkable co-incidences was able to carry out her vow - see Bertha M. Clay, Irene's Vow, Ward Lock Series.

the defendant took the plaintiff to the Marriage Registry, where he went inside, leaving her outside. After a while, he came out and informed the plaintiff that they had been married. Apparently, he had spent his time in the Registry speaking to his friends working there. He showed the plaintiff what purported to be a marriage certificate. She believed that they were married, and as a result was induced to live with him for three years. The parties, after the purported marriage ceremony at the Registry, had obtained a "church blessing" of the fictitious marriage, but this ceremony had no legal validity, and this fact was known by both parties. The plaintiff only discovered the defendant's duplicity when she attempted to divorce him on the ground of cruelty and was told that no valid marriage had actually taken place at the Registry. She sued for breach of promise to marry, and recovered damages. The court held that alternatively she could have sued for deceit.

It should be pointed out that section 46 of the Marriage Act provides that whoever goes through the ceremony of marriage, or any ceremony which he or she represents to be a ceremony of marriage, knowing that the marriage is void on any ground, and that the other person believes it to be valid, shall on conviction be liable to imprisonment for five years. No mention was made of this section in the case of Martins v. Adenugba [1] Liability by virtue of this section would depend on whether what took place at the Marriage Registry could properly be described as a ceremony.

Many people are still not aware of the correct procedure to be followed in order to effect a valid statutory marriage and only the briefest outline can be given here.[2]

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1. [1946] 18 N.L.R. 63.
2. For further details see the Marriage Act, Cap.115, Laws of the Federation of Nigeria, 1958 Revision, ss.21-30.

B. Preliminaries to marriage

There are two different types of authorisation to marry under the Nigerian Marriage Act: (a) the registrar's certificate and (b) a special licence.

(a) Before a marriage can be celebrated, notice of marriage applying for a certificate must be given on a prescribed form (supplied gratuitously) to the Registrar of Marriage of the district where the parties intend to marry. The notice must state the name and surname, age, marital status, occupation and place of residence of each of the persons to be married. Where necessary, the notice must also state that the consent of the father or other legal guardian has been given. Before the Registrar issues his certificate, he enters the details of the notice in the notice book, and publishes the notice by fixing a copy of it to the outer door of his office for at least twenty-one days.

Any person may enter a caveat in the notice book against the issue of the Registrar's certificate. For example, a parent or legal guardian whose consent is required for the marriage of a person under the age of twenty-one, may forbid the marriage by entering "forbidden" in the marriage notice book. Whenever a caveat is entered, the Registrar cannot issue his certificate until a High Court judge has ordered the removal of the caveat, after the determination of the issues involved.

Most of the caveats entered in Nigeria challenging the celebration of a marriage are by persons who claim that one of the parties to the intended marriage has been previously married (usually under customary law) to a third party, and that such prior marriage has not been dissolved. Such a claim, if proved is an absolute bar to a marriage under the Act.[1] The prior marriage

1. Compare In Re Grace Spencer [1964] 2 All N.L.R.171; and Registrar of Marriages v. Igbinomwanhia [1972] unreported decision of Benin High Court, delivered on 5 August, 1972, where the prior customary marriage was held valid; and

footnote 1 continued.....

must be strictly proved.[1]

The Registrar, even if no valid caveat has been entered, may refuse to issue a certificate until he is satisfied by affidavit that the conditions set out in section 11(1) of the Marriage Act have been fulfilled. A certificate is usually given, not earlier than twenty-one days after receipt of the notice to marry by the Registrar, and is valid for three months. No marriage should be celebrated before obtaining the certificate.

The Registrar's Certificate, however, is not evidence of a valid statutory marriage. In Sofela v. Sofela,[2] the wife petitioned for a divorce and tendered the Registrar's certificate issued on 30 October, 1970, stating that the marriage was to take place at Christ Apostolic Church, Mushin, Lagos. The Court held that the Registrar's certificate issued in pursuance of section 11(1) of the Marriage Act is only a certificate of notice of the intention of the parties to celebrate a marriage, and that in the absence of evidence of the celebration of the marriage, the court could not hold that there was any marriage between the parties recognizable under the Marriage Act and dissolvable under the Matrimonial Causes Decree, 1970.

This case may be compared with Akponer v. Akponer[3] where Dabiri, J., correctly held that oral evidence of marriage in a divorce petition can be given in proof of the marriage where a marriage certificate or a copy thereof is not available. Non-filing of the marriage certificate or a copy thereof cannot, therefore, defeat a petition for divorce if the marriage can be proved by oral evidence.

Footnote 1 continued..... In Re Ayorinde and Aina [1964] L.L.R. 71; Ikedionwu v. Okafor [1966-67] 10 E.N.L.R.178; Ogunremi v. Ogunremi and Anor.[1971] 2 U.I.L.R. Vol.2, 466; and In Re Beckley and Abiodun [1943] 17 N.L.R. 59, where the prior "marriages" were held invalid. In Okpanum v. Okpanum [1972] 2 E.C.S.L.R. 561, the prior customary law marriage was held valid, but it had been validly dissolved.

1. See Ogunremi v. Ogunremi and Anor [1971] U.I.L.R. Vol.2, Part IV, p.466.
2. [1976] 7 C.C.H.C.J. 1923.
3. [1974] 7 C.C.H.C.J. 1047; see also D'Almeida v. D'Almeida 4 C.C.H.C.J. 90.

After obtaining the Registrar's certificate the marriage may then be celebrated either in the Registrar's Office by the Registrar of marriages, or in any licensed place of worship, by any recognized minister of the Church, denomination or body to which such place of worship belongs, and according to the rites or usages of marriage observed in such Church, denomination or body.

It should be noted that publication of banns, although practised by most Churches in Nigeria, is not a legal necessity of a statutory marriage.

(b) Special licence

The Governor of a Region (now State) may, if he thinks fit, dispense with the giving of notice to marry, and with the issue of a Registrar's certificate authorising the celebration of the marriage. He may, on an application to do so, grant a special licence authorising the celebration of a marriage between the parties named in the licence, by a marriage registrar, or by a recognized minister of some religious denomination or body. The marriage need not be celebrated in a licensed place of worship, or the Registrar's office, but the necessary formalities appropriate to a marriage celebrated by the Registrar or by a recognized minister must be observed.[1]

The chief aims in obtaining a special licence to marry are to obviate delay and the possibility of lodging of caveats by interested parties. No notice of marriage is published, and there is no waiting period of twenty-one days.

A marriage celebrated in the Registry by issue of a special licence costs ₦11.00, one celebrated in a

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1. See sections 13 and 29 of Marriage Act., Cap 115, Laws of the Federation of Nigeria, 1958 Revision.

church or elsewhere ₦10.50, compared to only 75k. for the issue of an ordinary Registrar's certificate to marry.[1] In spite of the much higher costs involved, however, quite a few marriages in Lagos are celebrated after the issue of a special licence as Table 10:2 below shows.

TABLE 10:2

TYPES OF STATUTORY MARRIAGE CELEBRATED IN LAGOS

Type of Marriage	1973	1974	1975	1976	Jan-July 1977
Church Marriage (Reg.Cert.)	907	1075	1346	1347	970
Registry Marriage (Reg.Cert.)	629	723	775	663	545
Church Marriage (Special Licence)	-	27	45	28	19
Registry Marriage (Special Licence)	180	99	140	102	92
Total Number of Marriages	1716	1924	2306	2140	1626

7. Summary

Statutory marriage was introduced as a direct response to the need of Europeans resident in the then Gold Coast Colony to contract a marriage which would be recognized as legally valid in their countries of origin.

The framers of the Marriage Act, however, envisaged that the local inhabitants who had converted to Christianity would be persuaded to contract marriages under the Act instead of marrying according to customary laws, which they considered had certain objectionable features, the principal being that:

1. Information obtained from the marriage register at the Central Marriage Registry Lagos; see also Second Schedule, Marriage Act, and section 38 of Marriage Act which provides for a remission of fees by the Governor in cases of poverty.

(a) they permitted polygamy;
(b) the wives, and in some cases, the children, of a deceased husband who died intestate were deprived of any rights of inheritance in his estate;
(c) the payment of marriage consideration enabled parents of the spouses to dictate whom their children should marry;
(d) divorce was too easily effected.

It was also envisaged that non-Christians would continue to contract customary marriages until such time as they converted to Christianity.

As a result, complete separation between the two types of marriage was specifically erected in the statute, although both types were regarded as legally binding marriages. In theory, the plan was simple. Anyone and everyone had an option to choose which type of marriage he or she preferred to contract. If a person chose to contract a statutory marriage, his rights and obligations would be governed by "the general law". If it was a customary law marriage, the incidents of the marriage would depend on the laws of the particular society to which the parties belong.

To enforce strict separation of the two types of marriages, stiff penalties were imposed on a person who contracted a marriage under the Act during the existence of his customary law marriage to a third party; and also on a person who contracted a customary law marriage during the existence of his statutory marriage. The spouses of a customary law marriage, provided it was monogamous in fact, could also marry each other under the Marriage Act.[1]

In practice the plan of "marriage separation" was beset with difficulties which have resulted in conflicts and uncertainties.

The main difficulty is due to the fact that, contrary to the expectations of the framers of the Act, very few members of the local population, including those who

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1. See above, p.129.

professed Christianity, opted for statutory marriage. In the year 1891, eight years after the enactment of the Marriage Ordinance, 1884, less than sixty marriages were registered for Lagos Colony.[1] The annual number of statutory marriages has increased, but at present it is still comparatively small. Most people who did contract statutory marriages combined them with marriages under customary law, situations for the complications of which the Act made no provision.

The combination of the two types of marriage results in internal conflict of laws, many of which have not yet been solved by the courts. A more disturbing aspect of the combination of marriages is that it renders the dispensation of parental consent for non-minors, and the payment of dowry, largely ineffective since both requirements, at least in the case of the bride, are still necessary for the celebration of a valid customary law marriage.

The practice of the Churches in celebrating marriages without observing the specified formalities of the Marriage Act has resulted in additional complications and uncertainty as to the validity of such marriages. Many spouses have used the loophole created by the practice of the Churches in this respect, sometimes by mutual agreement, but more often unilaterally, to escape from the bond of marriage without going through the formalities of divorce procedure.

For various reasons, the requirement of mongamy imposed by the Marriage Act has been ignored by many persons resulting in breaches of the law. The point has been reached where people openly assert in court that they have committed a breach of the law in this respect and even seek to obtain advantage by their criminal act. Little or no notice is taken of these assertions by judicial and administrative officers, and the rarity of prosecutions for these open breaches brings the law in general, and the Marriage Act in particular, into disrepute.

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1. See Registrar's Returns for the Settlement of Lagos, Government Gazette 1892.

The Marriage Act attempts to state the factors which would invalidate a marriage, but these are incomplete, and thus introduce uncertainty into the law. For example, although it is taken for granted that parties to a marriage must consent to the marriage, lack of consent does not invalidate a marriage under the Marriage Act. This defect has now been cured by the Matrimonial Causes Decree, 1970, but other defects in the law remain. The most important of the remaining defects is the controversy which exists over the minimum age of marriage. Section 3(1)(c) of the Decree simply says that a marriage is void where either of the parties is not of "marriageable age". What is "marriageable age" is not stated and this omission gives rise to uncertainty.

The advantages women derive from contracting a statutory marriage will be examined at the end of the next chapter.

CHAPTER XI

THE STATUS OF WOMEN IN STATUTORY MARRIAGE (CONTINUED). THE INCIDENTS OF MARRIAGE

1. Introduction

In the preceding chapter, the formation and essentials of a valid statutory marriage were examined. In this chapter, the incidents and dissolution of such a marriage will be discussed.

The incidents and dissolution of a statutory marriage are derived from English law, and are presently governed by the Matrimonial Causes Decree, 1970, other local statutes, and the received English law in so far as it has not been excluded by local legislation. The incidents of a statutory marriage are therefore capable of more precise definition than was possible in the case of customary law marriage. Some of the rights and obligations of a statutory marriage are identical, or very similar, to the rights and obligations of a customary law marriage. For example, actions for enticement, and 'harbouring of a wife', pertain to both types of marriages. The method adopted, therefore, is to isolate those topics where marked differences occur between the two systems, and which are particularly relevant to the status of women, for discussion here.

The first part of this chapter deals with some aspects of consortium, certain rules of evidence, and maintenance. The dissolution of marriage is considered in the second part of the chapter. Property rights of the spouses are postponed for discussion in later chapters.

2. Conjugal Rights

A. Consortium.

The nature of consortium has previously been

noted in an earlier chapter.[1] The rights and duties involved in the concept of consortium in relation to a statutory marriage are not radically different from those which apply in a customary or Islamic law marriage in contemporary Nigeria. The rights and duties of a wife of a statutory marriage, however, are derived from English law and custom.

In the early nineteenth century it was generally held that under English common law a wife was under the absolute control of her husband. Bacon, in his Abridgement, wrote that the "husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty and may beat her, but not in a violent or cruel manner'.[2] As late as 1840, Mr. Justice Coleridge had no doubt of 'the general dominion which the law of England attributes to the husband over the wife"[3]; that dominion still included the right of a husband to apply physical chastisement to his wife and to enforce his right of consortium by restraining

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1. See above, Chapter VII, pp. 535-536.

2. Bacon's Abridgement, Tit. Baron and Feme, 7th edit. 1832, Vol. 1, p. 693; see Atwood v. Atwood [1718] Prec.Ch.492 where it was stated that a husband is entitled at common law to the custody of his wife against all other persons. Cf. Blackstone, Commentaries on the Laws of England, op. cit., Bk.I, p. 444, where, in 1768, it was said: "But with us in the politer reign of Charles the Second, this power of correction began to be doubted: and a wife may now have security of the peace against her husband; or in return a husband against his wife. Yet the lower rank of people who are always fond of the old common law, still claim and exert their ancient privilege." See R. v. Jackson [1891] 1Q.B.671, C.A., Re Price [1860] 2 F. and F.,263; R. v. Leggatt [1852] 18 Q.B.781.

3. Cockrane's Case [1840] 8 Dowl.630.

her movements.[1]

By the time of the reception into Nigeria of English law, however, at the end of the nineteenth century, the climate of opinion as to the legal status of the English married woman had undergone drastic changes. The legislature and judiciary had joined hands in liberating her from the legal shackles which bound her. The Married Women's Property Act, 1882[2] had accorded to a woman a measure of financial independence of her husband, and his right to restrain her personal liberty had been rejected in R. v. Jackson.[3]

In that case, the wife, who had gone to live with her relatives during her husband's absence in New Zealand, refused to live again with him on her return. She failed to comply with a decree of restitution of conjugal rights, whereupon the husband arranged with two men to seize her as she came out of church one Sunday afternoon. She was put into a carriage and taken to the husband's home. Although she was allowed complete freedom of the house, she was not permitted to leave it. It was unanimously held by the Court of Appeal, on a writ of habeas corpus issued by her, that it was no justification that the husband was merely confining her in order to enforce his right to her consortium.

Lord Esher, M.R., in his judgment said:

> A series of propositions have been quoted which, if true, make an English wife the slave, of her husband. One proposition that has been referred to is that a husband has a right to beat his wife. I do not believe this ever was the law... It was said by the law of England the husband has the custody of his wife. What must be meant by 'custody' in that proposition so used to us? It must mean the same sort of custody as a gaoler has of a prisoner. I protest that there is no such law in England.[4]

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1. See R.H. Graveson, 'The Background of the Century' in A Century of Family Law, edit. by Graveson and Crane, op. cit., p. 16.
2. 17 Stats., 116; 45 and 46 Vict., C.75
3. [1891] IQ.B.,671.
4. Ibid., p. 682.

The decision in R. v. Jackson[1] was inevitable after the passing of the Matrimonial Causes Act, 1884,[2] which removed the power of the court to imprison a wife who disobeyed an order for restitution of conjugal rights. In the words of McCardie, J.,:

> From the date of their [the Court of Appeal in R.v. Jackson] decision the shackles of servitude fell from the limbs of married women and they were free to come and go at their own will. Their high moral obligation, as wives, remained and their social obligations were unimpaired, but their physical freedom of movement was recognized and established by the law.[3]

A few years later, Parliament again intervened to give the married woman a clear and effective remedy against the physical violence of her husband.[4] By the end of the nineteenth century, therefore, most of the incapacities and restraints which had 'succeeded for generations in degrading an entire sex and in restraining its physical, mental and moral advance',[5] had been removed.

Nigerian women married under the Marriage Act inherit the benefits of these English law reforms. Although the husband has a right to the consortium of his wife, he is not entitled to resort to extra-judicial methods to enforce it.

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1. [1891] IQ.B.671.

2. 47 and 48 Vict.,C.69, section 2.

3. Place v. Searle [1932] 2K.B.497 at p.500; see also Butterworth v. Butterworth and Englefield, etc. [1920] P.126 at p.133, per McCardie, J., 'the decision of the Court of Appeal in R. v. Jackson marked the disappearance of the old and harsh view of a husband's rights over the body of the woman he has taken to wife'.

4. See Summary Jurisdiction (Separation and Maintainance) Act, 1895.

5. See Graveson, - "Introduction", A Century of Family Law op. cit.

B. Rights to sexual intercourse.

Each party to the marriage owes the other a duty to consummate the marriage, and the incapacity of either, or the wilful refusal of the respondent to do so, formerly entitled the petitioner to a decree of nullity. Under the Matrimonial Causes Decree, 1970, however, a marriage is voidable, if either party to the marriage is incapable of consummating the marriage,[1] but the wilful and persistent refusal of one of the parties to a marriage to consummate it provides a ground on which it may be held that a marriage has broken down irretrievably.[2]

Unlike the position in customary and Islamic laws, each spouse of a statutory marriage has an exclusive right to have sexual intercourse with the other spouse. This mutual right to exclusive sexual intercourse continues after the marriage has been consummated, provided that it is reasonably exercised. One spouse is not bound to submit to the demands of the other if they are inordinate, perverted, or otherwise unreasonable, or if they are likely to lead to a breakdown in health.[3]

Neither husband nor wife can be guilty as a principal, of rape upon the other,[4] but either party may be convicted of assault occasioning actual bodily harm.[5] Assault may be committed if either party, in pursuance of their right of sexual intercourse, uses force or violence for the purpose of exercising that right, and thereby causes harm to the other.[6]

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1. See Section 5(1)(a) Matrimonial Causes Decree, 1970.
2. Section 15(2)(a). See further below, pp. 260-265.
3. See Holborn v. Holborn [1947] 1All E.R.32; Akere v. Akere [1962] W.N.L.R.328.
4. See R. v. Miller [1954] 2 All E.R.529[1954] 2 Q.B.282; but the husband or wife may be guilty of aiding or abetting; Lord Audley's Case [1631] 3 St.Tr., 401, H.L.; R. v. Leak [1975] 2 ALL E.R.1059, C.A. A husband may also be guilty of rape where a decree nisi of divorce has been obtained, see R. v. Obrien [1974]3 ALL E.R.633.
5. R. v. Miller [1954] 2 ALL E.R.529[1954] 2 Q.B.282.
6. See R. v. Jackson [1891] 1 Q.B.671, C.A.

C. The wife's use of her husband's name.

A wife has no obligation to use her husband's name at common law, although it is usual for a wife to assume her husband's surname and, if he is a peer, his title and rank.

In Fendall v. Goldsmid,[1] Phillimore, J., noted that in English law,"marriage confers a name upon a woman which becomes her actual name, and ... she can only obtain another name by reputation". However, in the later case of Earl Cowley v. Countess Cowley,[2] Lord Lindley said that 'speaking generally the law of this country allows any person to use and assume any name, provided its use is not designed to deceive and inflict pecuniary loss'.

This was also the view in the still later case of Re Fry,[3] where Vaisey, J., said:

> I am quite well aware that many women, both married and unmarried, make use of pen-names and theatre-names, and there is, so far as I know, nothing to compel a married woman to use her husband's surname, so that the wife of Mr. Robinson may, speaking generally, go by the name of Mrs. Smith if she chooses to do so.[3]

In 1963, Buckley, J., stated:

> It is, of course, well known that a person's surname is a conventional name and forms no part of his true legal name. An adult can change his or her surname at any time by any means as a result of which he or she becomes customarily addressed by the new name. There is no magic in a deed poll. The effect of a deed poll when changing a name is merely to record the change in solemn form which will tend to perpetuate the evidence of the change of name. But a change of name on the part of an adult must, in my judgment involve a conscious decision on the part of the adult that he wishes to change his name and be generally known by his new name.[4]

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1. [1877] 2 P.D.263 at 264.
2. [1901] A.C.450 at p.460; see also R.v. Whitmore [1914]10 Cr. App. Rep.204. Cf. Du Boulay v. Du Boulay [1869]L.R.2 P.C.430, p.441-42.
3. [1945] Ch.348.
4. See in Re T. (Orse H.)(An Infant)[1963]Ch.238, 240-241.

Unlike the position in America, where a change in a woman's name upon marriage is not only consistent with social custom, but apparently it is also required by law,[1] the weight of English judicial opinion seems to be that the general rule is that 'there are no rules about surnames', and that a wife may use any name she pleases.

In Nigeria, the use of 'Mrs' and the husband's surname was at first regarded as a status symbol, when it was introduced there during the early twentieth century. It has been seen that generally, under customary law a wife does not assume her husband's surname. Speaking of the Yorubas, Johnson notes:

> A married woman cannot adopt her husband's totem [family origin] much less his name.[2]

This was also the customary law among most other societies.[3]

With the introduction of statutory monogamous marriage, the English custom of wives using their husbands' surnames was first adopted by wives who had contracted statutory marriages, as a symbol of their enhanced social prestige, a statutory marriage being generally considered superior to a customary marriage. The practice was confined to such women.

This monopoly has now been broken, and many wives,

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1. Many American judicial decisions have denied women's requests that they be permitted to be known by their maiden names after marriage. See e.g. Chapman v. Phoenix National Bank of the City of New York [1881]85 N.Y.437 at 449, where it was stated: For several centuries by the common law among all English speaking people, a woman upon marriage takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name. See also People v. Lipsky [1945] 63 N.E. 2d.642, and generally, Leo Kanowitz, Women and the Law: The Unfinished Revolution (Albuqueroque: University of New Mexico Press, 1969), pp. 41-46.

2. Johnson, History of the Yorubas, op. cit., p. 86.

3. See further above, Chapter VII, pp. 549-551.

regardless of the type of marriage contracted, use their husbands' surnames among the Igbos, Ibibios and other communities in the Eastern States.[1] The practice of using their husbands' surnames is less general among the Yoruba, many of whom continue to retain their own names after marriage.[2] It is usual for the educated Yoruba wife, however, to adopt her husband's surname.[3]

In Oye v. Oye,[4] the husband petitioned for divorce, and alleged that the wife's consistent refusal to change from her maiden name, in spite of his objection, and her other embarrassing and humiliating conduct left him 'disillusioned, shattered and depressed'. The respondent wife, who was a medical doctor, testified that it was the practice in her profession for a woman to go by her maiden name, unless the husband requested her to change it. She maintained that the husband had never made such a request. Odumosu, J., held, that the fact that the respondent refused, if in fact she did, to change her name after the marriage, was not such grave conduct as would amount to unreasonable behaviour under the provisions of section 15(2)(c) of the Matrimonial Causes Decree, 1970.

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1. There is still a significant number of wives in some parts of the Eastern States who continue to use their own names after marriage. In Eket and Calabar Customary Courts, most of the wives who were parties to cases used entirely different names from those used by their husbands. This situation may be compared to Onitsha or Enugu, where very few women retain their maiden surnames after marriage. In other areas, only educated women seem to change their names on marriage. There is a curious practice in Eket whereby older married women style themselves as 'Madame', while younger married women use 'Mrs.', in both cases with the husbands' surnames.

2. This practice is evident from the record of cases in the Customary Courts in Ibadan, examined by the present writer. Of 1116 cases examined, only 9 wives had the same surname as their husbands.

3. For a criticism of this practice, see Johnson, op. cit., p. 89.

4. [1974] 4 E.C.S.L.R.494.

The learned Judge did not consider whether there was a legal duty for her to use her husband's surname.

The use by a wife of her husband's surname has received a greater degree of attention lately, due to the activities of women's liberation groups. Kanowitz, in Women and the Law: The Unfinished Revolution, is of the opinion that:

> In a very real sense the loss of a woman's surname represents the destruction of an important part of her personality and its submersion in that of her husband.[1]

It is interesting to note that the Nigerian wife of a customary law marriage had traditionally retained her independence in this respect, and that the right which many American and other women are now fighting for - the right not to use their husbands' surnames if they so desire[2] - has long been her usual prerogative. Moslem wives in the Northern States have retained their independence in this respect, and generally continue to use their own names after marriage.

A wife may retain her husband's surname even after the termination of the marriage by death or divorce.[3] The editors of Halsbury's Laws of England note :

> Having assumed her husband's name, she [the wife] retains it, notwithstanding the dissolution of the marriage by decree of divorce or nullity, unless she chooses ... or acquires another name by reputation. On her second marriage there is nothing in point of law to prevent her from retaining her first husband's name.[4]

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1. Leo Kanowitz, Women and the Law, op. cit., p. 41.

2. See e.g. Chapman v. Phoenix National Bank of the City of New York [1881] 85 N.Y.437 at 449; People v. Lipsky [1945] 63 N.E. 2d. 642 at 647.

3. Fendall v. Goldsmid [1877] 2 P.D. 263; Earl of Cowley v. Countess of Cowley [1901] A.C. 450 H.L.

4. Third edition, vol. 19 (1957), p. 829.

A divorced wife who retains her former husband's surname may be restrained if, by doing so, she holds herself out as still being married to him. The husband may institute proceedings for a decree of jactitation of marriage under section 52 of the Matrimonial Causes Decree, 1970.[1]

Obi states that

> ... if a divorced woman holds herself out as still married to her former husband, who has in fact remarried to another woman, she will be liable for defamation at the suit of the man's current wife; the innuendo being that the latter is not lawfully married but living in sin with the man concerned.[2]

Although this may be the position in English law,[3] where a man domiciled in England can only have one wife, it is difficult to see how such an innuendo can be inferred in Nigeria, where a woman may be lawfully married, although her husband has many other legal wives. It is not defamatory for a woman to be married under customary law, nor can it be said that a customary law wife is living in sin, since customary law marriages are legally recognized in Nigeria.

D. Mutual protection and other rights

(1) Mutual protection.

Each spouse is entitled to use such force as is reasonably necessary to protect the other from physical harm in the event of a physical attack. A spouse may also use force, if necessary and reasonable in the circumstances, to resist unlawful threats of violence to the other spouse

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1. Section 52; Goldstone v. Smith [1922] 38 T.L.R. 403.

2. Obi, Modern Family Law in Southern Nigeria, op. cit., p. 220.

3. See Cassidy v. Daily Mirror Newspapers Ltd. [1929] 2 K.B. 331, C.A. in which it was held that a reference to another woman as 'Mr. C's fiancee' was defamatory of the plaintiff, the wife of Mr. C.

uttered in his or her presence.[1]

(2) Criminal responsibility.

A married woman is not free from criminal responsibility for doing, or omitting to do an act, merely because the act or omission takes place in the presence of her husband. But the wife of a statutory marriage is not criminally responsible for doing or omitting to do an act which she is actually compelled to do by her husband, and which is done, or omitted to be done in his presence, provided the act or omission does not constitute an offence punishable with death or cause grievous bodily harm to another person, or is not done with such an intention.[2]

A husband and wife cannot be guilty of the crime of conspiracy unless a third party is also involved.[3] This principle owes its origin to the common law,[4] and rests on the proposition of conjugal unity, the husband and wife

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1. See Criminal Code Act, 1916, Cap 42, Laws of the Federation of Nigeria, 1958 Revision, S.32(3); see generally Cyprian O. Okonkwo and Michael E. Naish, Criminal Law in Nigeria, (Excluding the North),(London: Sweet and Maxwell, 1964), pp.117-119 and 219-221; Lionel Brett and Ian McLean, The Criminal Law and Procedure of Lagos, Eastern Nigeria and Western Nigeria (London: Sweet and Maxwell, 1963), p.482, par. 1406.

2. S.33, Criminal Code Act.

3. Ibid., S.34; see also Keshiro and Anor. v. I.G.P. [1955-56] W.R.N.L.R.84; cf. Mawji and Anor. v. R. [1957] A.C.126; cf. R. v. Cope [1718] 1 Str.44.

4. For a criticism of the concept of unity of the spouses in the common law, see Bromley, Family Law, 1977, op. cit., pp. 107-109; see also Glanville Williams, 'Legal Unity of Husband and Wife', 10 M.L.R., 1947, pp. 16-31; Graveson and Crane, A Century of Family Law, op. cit.

being regarded as one person.[1] Since the crime of conspiracy needed at least two persons to establish the commission of the offence, it was not possible to do so where husband and wife acted alone. This rule of law is not extended to the spouses of a customary or Islamic law marriage, and the alleged discrimination has been the topic of criticism among legal writers.

Allegations of discrimination against customary law marriage are also made against certain provisions in the Evidence Act.[2]

(3) Rules of evidence.

When a person is charged with any of the offences specified in section 160(1) of the Evidence Act 1945,[3] the wife or husband of such person is a competent and compellable witness for the prosecution or defence, without the consent of the person charged. In other cases, however, a spouse may only give evidence on the application of the person charged.[4] Neither party to a marriage is compellable to give evidence in court disclosing communications made to

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1. See Blackstone Commentaries, op. cit., p. 442: 'The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated into that of the husband; see also J.E.G. De Montmorency, 'The Changing Status of a Married Woman', 13 L.Q.R., 1897, pp.187-199 at p. 192; 'Not only did she convey to him her personal and worldly goods, but she added the entire responsibility of her personality to the weight of his own. The Creator took from Adam a rib and made it Eve; the common law of England endeavoured to reverse the process, to replace the rib and to merge the personalities'.

2. See e.g. Kasunmu and Salacuse, op. cit., pp. 200-201; Nwogugu, Family Law in Nigeria, op. cit., pp. 88-89; Obi, Modern Family Law, op. cit., p. 268-275.

3. Cap. 62, Laws of the Federation of Nigeria, 1958 Revision.

4. See R. v. Adebowale and Ors. [1941] 7 W.A.C.A.142; Ajiyola and Ors. v. Animashaun [1943] 9 W.A.C.A.,22; R. v. Idiong and Anor. [1953] 13 W.A.C.A.30; Akpolokpolo v. The Commissioner of Police [1960] W.R.N.L.R.89.

him or her by the other spouse during the marriage.

Section 161(1) of the Evidence Act provides:

> 161. When a person charged with an offence is married to another person by a marriage other than a monogamous marriage such last named person shall be a competent and compellable witness on behalf of either the prosecution or the defence: Provided that in the case of a marriage by Mohammedan law neither party to such marriage shall be compellable to disclose any communication made to him or her by the other party during such marriage.

The reason for the protection of marital confidence between the husband and wife of an Islamic law marriage, but not of a customary marriage, is not easy to defend, since both types of marriages are potentially polygynous. In Faremilekun and Ors. v. The State,[1] sections 160(2) and 161(1) of the Evidence Act were challenged as discriminatory legislation which should be declared null and void, by virtue of section 28 of the Constitution of the Federation of Nigeria. It was held by the Western State Court of Appeal that the disabilities under section 161(1) of the Evidence Act are not against any citizen of Nigeria of a particular community, tribe, place of origin, religion or political opinion. The disabilities are against the customary form of marriage and apply to all citizens of Nigeria.

Restriction of the principle of unity of husband and wife to monogamous marriages only, although criticized by writers[2] as discriminatory, may be defended on the ground that extension of the principle of unity of husband and wife to polygamous marriages may discriminate against wives and result in injustice in some cases. Two examples will clarify this argument.

If a husband and his two wives conspire to commit

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1. [1974] 3 W.S.C.A.86.

2. See Nwogugu, Family Law in Nigeria, 1974, p.88; Cotran, 'The Laws of Marriage and Divorce in Kenya, op. cit., p. 421; see the report of the English Criminal Law Revision Committee, 11th Report, Evidence (General), Cmnd.4991, 1972, p. 92-98.

a murder, the husband cannot be found guilty of conspiracy, since he cannot legally conspire with either of them to commit a crime. The two wives, however, may be found guilty of conspiring with each other. Similarly, the ability of a spouse to testify against the other spouse may be of crucial importance to a finding of guilt of an accused person, for in many cases the spouse is the only person who has knowledge of the guilt of the accused.[1] If the unity rule were extended to polygamous marriages, the wives of a husband who commits a murder in their presence would be incapable of giving evidence against him. If one of the wives, however, commits an offence in the presence of her husband and her co-wives, although the husband would not be compelled to give evidence against her, the co-wives would not be so exempted. This of course results in an advantage to the husband, and discrimination against the wives. Justice or impartiality can only be achieved if all parties of a polygamous marriage are considered as a single unity. The interests of justice demand that if parity between customary law marriages and statutory marriages is to be achieved, this should be accomplished by the abolition, of the rule, rather than to its extension in this manner.[2]

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1. See e.g. Wilson Udoada and Ors. v. The State, [1975] 1 S.C. 72; where the spouses were married under customary law. The wife's evidence that her husband killed the deceased, and brought the human meat to her kitchen to be cooked, that after she refused to allow him to do so, he cooked it in his room and ate it, was instrumental in the convictions for murder of her husband and six other men.

2. See Glanville Williams, 'The Legal Unity of Husband and Wife', 10 M.L.R. 1941, p. 16 at pp. 20-22, for arguments in favour of abolition of the rules pertaining to the unity of the spouses; see the English Criminal Law Act, 1977, S.2(2) which provides that a person agreeing only with his or her spouse to commit a crime is exempted from liability for conspiracy, so far as the law of conspiracy still applies. See generally, Edward Griew, The Criminal Law Act, 1977 (London: Sweet and Maxwell, 1978), pp. 45/1-45/5.

3. The Affiliation and Custody of Children

A. Affiliation.

It has been mentioned previously that the laws of most traditional patrilineal societies had similar rules governing the legal paternity of children of a marriage. In English common law the legal maxim, 'Pater est quem nuptiae demonstrat', that is, the presumption that if a child is born to a married woman, her husband is deemed to be its father, until the contrary is proved, applied.[1] A child is legitimate at common law if his parents were married at the time of his conception or at the time of his birth. A child born in wedlock is presumed to be legitimate.

Unlike customary law, the presumption of legitimacy is rebuttable,[2] but it was regarded as contrary to public policy that either parent should give evidence that a child of the marriage was illegitimate. Consequently neither husband nor wife was permitted to give evidence of non-access by the other spouse if this would have the effect of bastardizing the issue of the marriage. In 1924, the House of Lords held that the rule applied to proceedings for divorce.[3] This rule was changed in England by the Matrimonial Causes Act, 1950, which abolished the old common law rule,[4] and allowed either party to give evidence of non-access, even where such evidence would result in the

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1. See Blackstone, Commentaries, op. cit., p. 457; Williams, op. cit., chapt.12, and Bracton, The Laws and Customs of England, trans. with revision and notes by Samuel E. Thorne, 1968, p.34; Banbury Peerage Case [1811] 1 Sim and St. 153, H.L.

2. The presumption of legitimacy in customary law is rebuttable in some systems of law; see Mariyama v. Sadiku Ejo [1961] N.R.N.L.R.81.

3. Russell v. Russell [1924] A.C.687.

4. The old common law rule was enunciated in Russell v. Russell [1924] A.C.687.

illegitimacy of a child of the marriage. The parties were not compellable to give such evidence.

In Nigeria the common law rule, as amended by the Matrimonial Causes Act, 1950,[1] was applied to children of a statutory marriage. In Egwunwoke v. Egwunwoke,[2] while a divorce suit between the parties was pending, the wife applied for an order to compel the husband to pay reasonable expenses for the maintenance of D., said to be a 'child of the marriage'. D. was born while the parties were married. The husband sought to prove that D. was illegitimate and that he was not D.'s father. Aniagolu Ag. J., (as he then was), held that, by virtue of section 32 of the Matrimonial Causes Act 1950, the petitioner husband was at liberty to prove that D. is not his child. The court also held that where a child is born in wedlock, intercourse is presumed to have taken place between the husband and the wife resulting in the birth of the child, until the contrary is proved.

The Matrimonial Causes Act 1950, was in conflict with the Evidence Act of Nigeria, 1945, which provided that a child born during the continuance of a valid statutory marriage, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, is presumed to be legitimate. Neither of the parents of such a child was allowed to give evidence to rebut this presumption.[3]

In Elumeze v. Elumeze,[4] a husband left Nigeria for the United States of America in 1948, leaving his wife in Nigeria. She joined him there in October, 1950. A child was born to her five months later. The Lagos High Court held that there can be no doubt that, by the laws of

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1. The common law rule that neither spouse could give evidence of non-access which would tend to bastardize the wife's children was abrogated by the English Law Reform (Miscellaneous Provisions Act, 1949, S.7; see now the English Matrimonial Causes Act, 1973, S.48(1).

2. 1966 N.M.L.R.,147; [1966] 2 ALL N.L.R.I.

3. See S.147 Evidence Act, 1945, Cap.62, Laws of the Federation of Nigeria, 1958 Revision.

4. [1969] 1 ALL E.R.311.

nature, and relying on decided cases, it would be repugnant that a court should hold that the husband was the father of such a child. The husband was allowed to give evidence of non-access. On appeal to the Supreme Court, it was held that the husband's evidence was not admissible, because of the proviso to section 147 of the Evidence Act, 1945, which remained in force in Nigeria, notwithstanding, section 32 of the English Matrimonial Causes Act, 1950. The appeal was allowed.

The law in Nigeria, until recently, therefore, was that neither spouse could give evidence of non-access if this would have the effect of bastardizing the issue. Egwunwoke v. Egwunwoke[1] seems to have been wrongly decided.

The law has now been altered by the Matrimonial Causes Decree, 1970, which has repealed the provisos to section 147 of the Evidence Act.[2] Under the Matrimonial Causes Decree, 1970,[3] either parent may give evidence to rebut the presumption of legitimacy of a child born during the marriage.

Unlike the position in customary or Islamic law,[4] a husband has no claims to the legal paternity of the children of his wife begotten by another man during the marriage, nor at any time after its termination by divorce or death. This is a drastic change, especially in regard to customary law, where legal paternity is governed by the payment and non-refund of dowry.[5]

B. Custody.

At common law, the father was entitled to the

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1. [1969] 1 ALL E.R.311.

2. See S.115(3) Matrimonial Causes Decree, 1970.

3. Ibid., S.84; see also Sifo v. Sifo [1972] 1C.C.H.C.J.52.

4. See above, Chapter VII, pp.593 et al; Chapter, IX, p. 73 et al.

5. See above, Chapter VIII,

custody of his legitimate children until they reached the age of twenty-one. This right was absolute, except in the rare cases where the father's conduct was such as to gravely imperil the child's life, health or morals. In mid-Victorian England, it appeared unthinkable under any circumstances to infringe the common law right of the father to the sole and exclusive control and guardianship of his children. Thus in ex p. Skinner[1] the court refused to interfere with the father's custody, although his wife had left him in consequence of his cruelty to her, and he was allegedly cohabiting with a woman who visited him while he was in prison. The child, who was six years of age, was taken daily by this woman to visit him at the prison.

A father could defeat the right of the mother of his children to be their legal guardian after his death, by appointing a testamentary guardian.[2]

Gradually, however, the view that the welfare of the child was the first consideration was adopted, and in consequence, the mother was progressively given an equal right to custody of her children. It is worthy of note that the mother's right to the custody of her minor children correlated with the improved legal status of married women. This was expressly recognized by the Guardianship of Infants Act, 1925,[3] the preamble of which

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1. [1824]9 Moore C.P.279; see also R.v. Mannerville [1804] 5 East, 221.

2. See the comments of J.E.G. De Montmorency on the provision of the law in this respect. 'Nothing shows more vividly that degrading subjection of the woman to the man that civilization sanctioned than the fact that over the child at her breast the mother had no legal hold, no recognized possession. The doctrines of the oneness of the husband and wife, which legitimately sanctioned this, becomes at once finally exposed in all its brutality, and seems indeed barbarous in our eyes' -"The Changing Status of a Married Woman", 13 L.Q.R. 1897, pp. 187-199 at p. 197.

3. 17 Stats. 424.

stated;

> Whereas Parliament by the Sex Disqualification (Removal) Act 1919, and various other enactments, has sought to establish equality in law between the sexes, and it is expedient that the principle should obtain with respect to the guardianship of infants and the rights and responsibilities conferred thereby.

The Act gave statutory effect to the rule that in any dispute relating to a child, the court must regard its welfare as the first and paramount consideration. It also provided that neither parent had a superior claim, as against the other, in regard to the custody or upbringing of a child, and gave to the mother the same right to appoint a testamentary guardian as the father had.

The Guardianship of Infants Act 1925, being a post-1900 statute, does not apply to Nigeria. Its provisions have, however, been incorporated in the Infants Law 1958,[1] which applies in the Western and Mid-Western States. In the other parts of the Federation, the pre-1900 English statutes on custody of children, as statutes of general application, apply.[2]

The decided cases in Nigeria show that the guiding principle is the welfare of the child, and English decisions on the subject have been cited with approval in all parts of the Federation.

In Apara v. Apara,[3] the Supreme Court held that it should not be assumed that the successful party must have custody of the children, or that he is the proper party to whom the care of the children of the marriage should be entrusted. The welfare and interest of the children were the paramount considerations in a grant of custody.

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1. Cap 49, Laws of the Western Region of Nigeria, 1959 Revision.

2. See e.g. Guardianship of Infants Act, 1886, 17 stats. 415; Custody of Children Act, 1891, 17 Stats. 419; Talfourd's Act, 1839, 2 and 3 Vict., C.54.

3. [1968] 1 ALL N.L.R.241.

The Matrimonial Causes Decree, 1970, now provides:

> In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the court shall regard the interests of those children as the paramount consideration; and subject thereto, the court may make such order in respect of those matters as it thinks proper.[1]

In Anazia v. Anazia[2] the court stated that the welfare of the minors was the first and paramount consideration, and no account should be taken as to whether, from any other point of view, the claim of the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father.

The traditional attitude that custody of a child should be given to his father except where there is abundant evidence that he is not a suitable person, or the child is too young to be separated from his mother,[3] still lingers

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1. Matrimonial Causes Decree, 1970, section 71(1).

2. [1977] 4 C.C.H.C.J.,699; see also Jegede v. Jegede [1972] 12 C.C.H.C.J. 121; Babalola v. Babalola [1972] 11 C.C.H.C.J. 110; Ojo v. Ojo [1969] 1 ALL N.L.R.435, where an appeal was granted by the Supreme Court on the ground that the order for custody of the children of the marriage to the respondent wife was made without due enquiry as to the welfare of the children in accordance with rule 33(a) of the Matrimonial Causes Rules, 1957; see also Oguntokun v. Oguntokun [1972] 12 C.C.H.C.J.106.

3. E.g. Oni v. Oni [1973] 7 C.C.H.C.J.41 at p.44; where custody of a child four years of age was awarded to the father, the Court ordered that the child should be kept by the mother until he was 7 years old, when he should be given to the father. On appeal to the Supreme Court to vary the custody order when the father remarried, the Supreme Court held that 'the mere fact of remarriage by a divorcee in whose favour an order for custody was made, does not ipso facto deprive him of the legal custody of his children. The circumstances must be examined to decide whether it is in the best interest of the children that custody should remain in him.' The order was confirmed.

on, however, and is evident in some High Court decisions. For example, in Akapo v. Akapo,[1] the Judge, Kassim, J., after awarding custody to the respondent, the mother of the children, said of the petitioner husband, that he was living in such a house, and in such a manner, that no reasonable person would give him custody of a child. He added, however, that it was open to any suitable member of the petitioner's family to ask, at the instance of the petitioner, for the custody of the children of the marriage. There was no evidence that the mother was not a suitable person to whom custody should be awarded, and the mother's family was not invited to apply for custody, although the judge had previously stated that both parties to the marriage were 'indulged persons from well-off families'.

Similarly, in Oloyede v. Oloyede,[2] the trial Judge found the father to be not a man one could trust with the upbringing of children. He also noted the provisions of section 71(1) of the Matrimonial Causes Decree, 1970. In spite of these facts, and presumably because the wife was an Irish national (he thought that no condition as to her not taking them out of the country would be effective), he granted custody of the children to the father, on certain conditions. On appeal, the Western State Court of Appeal reversed the decision and gave custody to the wife.

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1. [1972] 7 C.C.H.C.J.105; cf. Oyedu v. Oyedu [1972] 2 E.C.S.L.R.41; where it was stated obiter: 'However benevolent a foster parent might have been it is an inalienable right of parents to look after their children, and their custody must be preferred when they are able to look after the children, to that of a foster parent. A parent cannot stand by and see her children being fostered when she is alive, healthy, has the means with which to look after the children, and is not otherwise disqualified', but see Section 71(3) of M.C.D. "The court may grant custody to a person other than a party to the marriage as it thinks fit".

2. [1975] 3 W.S.C.A.73.

4. Maintenance.

The husband of a statutory marriage has an obligation to maintain his wife during the existence of the marriage.[1] The fact that the wife has property or a separate income greater than that of her husband is generally irrelevant.[2] The general obligation of a husband is to maintain his wife in his own home. A wife, therefore, who claims maintenance while living apart from her husband, must justify her absence from his home.[3] She must show either that her husband deserted her, or that he turned her out of his home. The wife who chooses to leave her husband against his wishes has no claim on him for maintenance.[4] The wife's right of maintenance is governed by the common law and by statute. The position at common law will therefore be discussed first, and then the position under relevant statutes.

A. Maintenance under the common law.

At common law a husband became entitled to most of his wife's property; in return, he was obliged to maintain her by providing her with necessaries.[5] This common law right to maintenance is 'not a right to an allowance, but to be supported by being given bed and board'.[6] It is

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1. Williams v. Williams [1976] 3 C.C.H.C.J. 805.

2. Samson v. Samson [1960] 1 W.L.R. 190.

3. Baker v. Baker [1949] 66 T.L.R.(Pt.1)81; Stirland v. Stirland [1959] 3 ALL E.R.891.

4. National Assistance Board v. Parkes [1955] 2 Q.B.506. C.A.

5. Blackstone, Commentaries, op. cit., p. 442; Manby v. Scott [1660] Smiths Leading Cases, 13 edit., p. 417; Povey v. Povey [1971] 2 W.L.R.381; [1970]3 ALL E.R. 612.

6. Lilley v. Lilley [1960] P.169, 178.

for the husband to decide the scale on which the family shall live, and not for the court. Thus, in McGuire v. McGuire,[1] where a husband had not given his wife any money for her own use for thirty-three years, and failed to provide other home comforts, despite his comparative wealth, an American court held that the husband was legally supporting his wife, and that the purpose of the marriage obligation was being carried out.

The husband's duty to provide his wife with the necessities of life is prima facie complied with if he provides a home for her.[2] His obligation remains if the spouses are obliged to live apart, for example, owing to the illness of one of them.[3]

Although the common law purported to give a wife the right to be maintained during the marriage (unless she committed adultery), the right could not be effectively enforced. The common law rule that neither spouse could sue the other, precluded the wife from enforcing her right by action, if her husband failed to fulfil his duty to maintain her. The courts, however, gave a wife an indirect remedy instead. So long as she was entitled to be maintained,[4] the wife could bind her husband by her contract for the supply of 'necessaries' such as food, clothing and essential services. The power to pledge the husband's credit was termed the wife's agency of necessity. The husband could not escape his liabilities by forbidding his

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1. [1953] 59 N.W.2d.36.

2. See McGowan v. McGowan [1948] 2 ALL E.R.1032; 1034; Price v. Price [1951] P.413, 420-421, C.A. W. v. W. (No. 2)[1954] 2 ALL E.R.829,840,C.A.; [1954]P.486,515-516.

3. See Lilley v. Lilley [1959] 3 ALL E.R.283, C.A.; [1960] P.169, C.A.

4. The onus is on the wife to show that the husband is liable to maintain her; Stringer v. Stringer [1952]P.171, explained in National Assistance Board v. Parkes [1955]2 Q.B.506. C.A. See also Pinnick v. Pinnick [1957] 1 W.L.R. 644 and Lilley v. Lilley [1960]P.169, C.A.

wife from pledging his credit, or the tradesmen from supplying her with goods and services.[1] The agency was terminated, however, by anything which terminated the common law duty to maintain. For example, if the wife committed a single act of adultery, she automatically forfeited her rights to maintenance.[2] Similarly, a wife who deserted her husband lost her right to be maintained by him,[3] until the desertion was ended.[4]

This common law right of the wife to maintenance, and the remedy of pledging her husband's credit to enforce the right, was received into Nigeria under the general reception of English law. In Hutchson v. Madam Olajide,[5] Mrs. H. was married to Mr. H. under the Marriage Act. As a result of his cruelty, she left the matrimonial home in February 1966. The respondent, a relation of Mrs. H., sued H. for recovery of £480 which she alleged she had lent Mrs. H. for her maintenance, feeding and clothing between February 1966 and the end of May 1967. Neither the respondent nor Mrs. H. was able to prove how this money had been spent, but the trial judge assessed Mrs. H.'s expenditure on necessaries at £15 per month. He gave judgment in favour of the respondent for £240. Mr. H. appealed: it was held by the High Court

1. That a wife whose husband's cruelty has forced her to leave him is entitled to pledge his credit for necessaries.

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1. Compare the position where a wife has presumed authority to pledge her husband's credit for necessaries. The husband's liability may be excluded in such cases if he expressly forbade his wife, or a tradesman, to obtain or give goods on credit. See Shoolbred v. Baker [1867]16 L.T. 359.

2. See Wright and Webb v. Annandale [1930]2 K.B.8,C.A.

3. National Assistance Board v. Wilkinson [1952]2 Q.B.648.

4. Jones v. Newton and Llanidloes Guardians [1920]3 K.B.381; See also Price v. Price [1951]2ALL E.R.580,C.A.[1951]P.413; Naylor v. Naylor [1961]2 ALL E.R.129.

5. [1970] N.N.L.R.31.

2. But that this right is subject to her own means and earning power and the availability and adequacy of a court order for maintenance.

3. That her right is also limited to pledging her husband's credit for goods and not for money.

4. That an action by a lender of money for the purpose of a deserted wife buying necessaries is an action in contract by subrogation to the right of the supplier of goods. Therefore he could only recover by the proof of purchase of specific goods.

This type of agency of necessity arises from the fact of marriage, not cohabitation, and is therefore not available to a wife married under customary law, (unless she could prove that she had such a right under customary law),[1] or to a concubine.

A wife married under customary law, or a concubine, has presumed authority to pledge her husband's credit while she is cohabiting with him, since this is a contractual right based on cohabitation and not marriage.[2]

B. Maintenance under statute law (pre-1970).

Whether the wife of a statutory marriage can enforce her rights to maintenance by a separate action, if she has not petitioned for divorce or other matrimonial relief, is not free from doubt.

Since 1886, it has been possible for a wife in England to enforce her common law right of maintenance by obtaining a financial order on the ground that her husband had wilfully neglected to maintain her. Such actions were initially only made enforceable in Magistrates' Courts by a series of Acts which became collectively known as the

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1. See above, Chapter VII, pp. 585-589. See the position in Islamic law, above, Chapter IX, pp. 68-70.

2. Debenham v. Mellow [1880] 6 App.Cas.24(H.L.).

Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949. In 1949, a wife in England was also enabled to petition for maintenance alone, in an action before the High Court, by virtue of the Law Reform (Miscellaneous Provisions) Act, 1949.

Are any of the rights given to a wife in England to enforce her right to maintenance as an independent action, available to a wife in Nigeria?

The question of the applicability of the 1895 Summary Jurisdiction Act was considered in Okpaku v. Okpaku.[1] Mrs. Okpaku, who had been married under the Nigerian Marriage Ordinance, brought an action for maintenance against her husband. Since there was no Nigerian legislation which gave her the right to sue for maintenance alone, she brought her action under the English Summary Jurisdiction Act, 1895 by virtue of the Supreme Court Ordinance 1943. This Ordinance provided for the application in Nigeria of the common law of England, the doctrines of equity, and the statutes of general application in force in England on the 1st January, 1900.[2]

The Supreme Court of Nigeria granted her maintenance. The West African Court of Appeal, however, reversed the decision, on the ground that the Supreme Court had no jurisdiction to entertain such an action, since the Summary Jurisdiction Act, 1895, was not a statute of general application, as it did not apply to Scotland or Ireland.[3] Consequently, it did not apply to Nigeria.

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1. [1947]12 W.A.C.A.137.

2. See above, chapter II.

3. In Lawall v. Younan [1961]1 ALL N.L.R.245,256, Brett, J. stated that Okpaku v. Okpaku was decided per incuriam because the West African Court of Appeal had failed to take account of Young v. Abina [1940]6 W.A.C.A.180, where it was held that "the words of general application are used with reference to the matter of the statutes and not only geographically".

As a result, Mrs. Okpaku, although she had a right of maintenance, was no better off than a wife married under customary law. She could not enforce her right, except by the indirect method of pledging her husband's credit for necessaries, or by bringing an action for divorce or judicial separation etc., and claiming maintenance as an ancilliary relief.

With reference to the Law Reform (Miscellaneous Provisions Act, 1949, and its successors, they are undoubtedly post-1900 imperial legislation, and can only apply to Nigeria by virtue of a different enabling provision.

In Ekisola v. Ekisola,[1] the wife brought an action in the Lagos High Court for a maintenance order for herself and the children of the marriage. She claimed that the husband drove her away from the matrimonial home and that he wilfully neglected to maintain her. The action was brought under section 23 of the Matrimonial Causes Act, 1950, of England. Coker, J., upheld her claim on the ground that the High Court was enjoined by section 16 of the High Court of Lagos Act, to exercise its jurisdiction in matrimonial causes in conformity with the law and practice for the time being in force in England, and that this included the English law under section 23 of the Matrimonial Causes Act, 1950.

This decision was followed in Ehigiator v. Ehigiator,[2] by Begho, J. The application for an order of maintenance was brought under section 23 of the English Matrimonial Causes Act 1950, as an independent action. Begho, J., held that the Act was applicable in the Mid-Western Region by virtue of section 4 of the Regional Courts (Federal Jurisdiction) Act which reads:

> The jurisdiction of the High Court of a Region in relation to marriages and the annulment and dissolution of marriages and in relation to other matrimonial causes shall, subject to the

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1. [1961] L.L.R.8.

2. [1966] 2 ALL N.L.R.169.

> provision of any laws of a Region so far as practice and procedure are concerned, be exercised by the Court in conformity with the Laws and practice for the time being in force in England.

The application was allowed and maintenance awarded.

C. Maintenance under the Matrimonial Causes Decree 1970.

The English Matrimonial Causes Acts no longer apply in Nigeria, by virtue of sections 1(1), 8, and 115(2) of the Matrimonial Causes Decree, 1970.[1]

Whether a wife may bring an independent action for maintenance under the Decree, has not yet been clearly decided. There are conflicting judicial decisions and opinions.

The provisions with respect to maintenance are in section 70 of the Decree:

> 70. (1) Subject to this section, the court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order of maintenance pending the disposal of proceedings, make such an order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage, and all other relevant circumstances.
>
> (2) Subject to this section and to rules of court, the court may, in proceedings for an order for the maintenance of a party to a marriage, or of children of the marriage, pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.
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> (3) The court may make an order for the maintenance of a party notwithstanding that a decree is or has been made against that party in the proceedings to which the proceedings with respect to maintenance are related.
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> (underlining mine)

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1. Decree no. 18 of 1970.

In Akinwunmi v. Akinwunmi,[1] the wife brought an application solely for maintenance without bringing a petition for a principal relief. The application was brought under section 22 of the English Matrimonial Causes Act, 1965. It was submitted on behalf of the respondent that the action was untenable in view of the provisions of the Matrimonial Causes Decree 1970, which made the English Act inapplicable in Nigeria on the 17 March 1970. This submission was rejected by Adefarasin, J., who held that the application could be entertained. He stated his reason thus:

> Section 70 and 71 of the Matrimonial Causes Decree, 1970 make adequate provisions for proceedings for the maintenance of a party to the marriage and also for the custody and maintenance of the children of the marriage independently of whether there is a prayer for a principal relief for a decree of dissolution, nullity, judicial separation, etc. It is my clear opinion that a spouse who desires orders for maintenance and custody of children is entitled to seek such orders under sections 70 and 71 of the Matrimonial Causes Decree 1970, notwithstanding that she has not at the same time presented a petition for a principal relief. It is my view that the provisions of sections 70 and 71 of the Decree are quite similar to those of sections 22 and 35 of the Matrimonial Causes Act, 1965 of the United Kingdom. By them applications can be made to the court for some reliefs independently of some petitions for dissolution, nullity of marriage or an order for judicial separation.

Two points made by the Judge in the above passage call for comment. First, it is respectfully submitted that the learned Judge's attempt to justify the wife's claim brought under section 22 of the English Matrimonial Causes Act, 1965, because of the similarity of sections 22 and 35 of that Act to section 70 of the Matrimonial Causes Decree, 1970, is untenable. The fact that the English Matrimonial Causes Act 1965 no longer applies in Nigeria

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1. [1971] Suit No. M/66/70 unreported decision of Lagos High Court, delivered on 19 March 1971.

after the commencement of the Decree is abundantly clear. The first section of the Decree provides:

> 1. (1) After the commencement of this Decree, a matrimonial cause shall not be instituted otherwise than under this Decree; and if a matrimonial cause has been instituted before the commencement of this Decree but not completed, it shall be continued and dealt with only in accordance with the provisions of this Decree prescribed in that behalf.

Even if it is argued that the peremptory provisions of section 1(1) of the Decree should be confined to 'matrimonial causes' as defined by the Decree, and should not be extended to independent actions for maintenance, which admittedly are not 'matrimonial causes' under the Decree, such an argument loses its validity when the provisions of section 8 of the Decree are taken into account.

> 8. The jurisdiction conferred on a court by this Decree shall be exercised in accordance with this Decree; and any law in force immediately before the commencement of this Decree which confers jurisdiction in divorce or matrimonial causes on the High Court of a State or provides for the law and practice to be applied in the exercise of that jurisdiction shall, to the extent that it does so, cease to have effect.

This section, in effect, repeals the State Courts (Federal Jurisdiction) Act,[1] (formerly cited as the Regional Courts (Federal Jurisdiction) Act),[2] which, prior to the enactment of the Decree, provided for the application in Nigeria of current English law on matrimonial causes.[3] In Olu-Ibukun v. Olu-Ibukun,[4] the Supreme Court held that the trial judge was in error in treating an application under the Matrimonial

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1. See also section 115(2) of the Matrimonial Causes Decree, 1970, which amends and repeals the State Courts (Federal Jurisdiction) Act.

2. Cap. 117, Laws of the Federation of Nigeria, 1958 Revision.

3. See the various High Court Laws - High Court of Lagos Act, 1958, Cap. 80, S.16; Eastern Nigeria - Customary Courts Law, 1963, Cap.61, S.11; Northern Nigeria, - High Court Law, Cap.49. S. 13(1), Laws of Northern Nigeria, 1963 Revision, - Western Nigeria, Cap.44, Laws of the Western Region, 1959 Revision, S.8.

4. [1974] 1 N.M.L.R. 280; [1974] 2 S.C.41; Falobi v. Falobi [1974] 4 W.S.C.A.198.

Causes Decree 1970, as if it was one under the English Matrimonial Causes Act, 1950, which ceased to apply in Nigeria when the Decree came into force on 17 March 1970.

Secondly, Adefarasin J.'s view that the provisions of section 70 of the Decree permit an independent action for maintenance to be brought, is supported by the opinion of Kazeem, J. in Esua v. Esua,[1] who stated his opinion thus:

> The ... wordings of section 70 and 71 of the Decree are not ambiguous and I am clearly of the opinion that separate applications for maintenance and custody of children could be brought under the two sections without their being tagged on to other reliefs.

Ogoro, J., in Ajiboye v. Ajiboye,[2] after reviewing a number of rulings in other cases stated;

> The Court has jurisdiction under the plain and unambiguous provision of Section 70(1) of the Matrimonial Causes Decree No.18 of 1970 to hear and determine an application for the maintenance of a party to a marriage or of the children of the marriage notwithstanding the fact that there is no petition before the court for a principal relief under the Decree.

This opinion was also expressed in other cases[3] and by legal writers.[4]

There are, however, several other decisions[5] and opinions[6] which express a contrary view. In Babalola v.

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1. [1970] Suit No. M/63/70 unreported, Lagos High Court, 4 Dec. 1970.

2. [1975] 4 C.C.H.C.J.769.

3. See Asomugha v. Asomugha [1972] Suit No. M/139/72 7 C.C.H.C.J.63; Oni v. Oni [1971] Suit No. M/52/70, unreported Ibadan High Court, 27 Jan. 1971; Dawodu v. Dawodu [1975] C.C.H.C.J.257.

4. See Itsejuwa E. Sagay, Case Law Under the Matrimonial Causes Decree, (Ife: Nigeria, 1974), p. 77-84.

5. See e.g. Esua v. Esua [1970](per George J.) Suit No.M/63/70, unreported, Lagos High Court, 3 July 1970; Adekoya v. Adekoya [1973] 2 C.C.H.C.J.73.

6. See S.A. Adesanya, Laws of Matrimonial Causes (Ibadan; Ibadan University Press, 1973), pp. 5-6; A.B. Kasunmu, 'Matrimonial Causes Decree, 1970', Nigerian Journal of Comparative Law, 1971, Vol.2, No.1, p.88; and Nwogugu, Family Law, op. cit., pp. 214-215.

Babalola,[1] the wife brought an application for maintenance of herself and the children of the family. The application was brought under sections 70(1) and 71 of the Matrimonial Causes Decree. No 'matrimonial cause' as defined in section 114 of the Decree had been completed or pending. The husband/respondent submitted that the Court had no jurisdiction, since such relief as was claimed by the wife could not be brought when there was no 'matrimonial cause'. Ayoola, J., held that the Court had no jurisdiction, and that section 70(1) of the Decree could not be invoked, unless it is related to a 'matrimonial cause' as defined in section 114(1)(a) and (b) of the Matrimonial Causes Decree, pending or completed.

The learned Judge argued that to arrive at the true meaning of section 70, the section must be viewed in the context of the whole statute, including its title, preamble and the intention of the law-maker expressed in the law itself taken as a whole. He noted that section 70 (1) is part of a Decree entitled 'Matrimonial Causes Decree' and concluded as a result that the Court only had jurisdiction over 'matrimonial causes' as defined by the Decree. Since independent actions for maintenance were not 'matrimonial causes', the court had no jurisdiction to entertain them under the Decree.

It is respectfully submitted that the cardinal principle of interpretation of a statute is that external aids to interpretation, such as reference to the title, marginal notes, or preamble of a statute, should only be enlisted when the text of the provision is not clear. In 1977, in the case of Mobil Oil (Nigeria) Ltd. v. Federal Board of Inland Revenue,[2] the Supreme Court of Nigeria reiterated this cardinal principle which had previously been laid down in several of its previous decisions. It

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1. [1974] N.M.L.R.57.

2. [1977] 3 S.C.53.

held that;

> ... the general rule for construing a statute is that where the words of a statute are clear the court shall give effect to their literal meaning. It is only when the literal meaning may result in ambiguity or injustice that the court may seek internal aid within the body of the statute itself or external aid from statutes in pari materia in order to resolve the ambiguity or avoid doing injustice.[1]

As correctly stated by Agora, J., in Ajiboye v. Ajiboye,[2] and Kazeem, J., in Esua v. Esua,[3] the terms of sections 70, and 71 are not ambiguous, nor do they conflict with any other section of the Decree. There is, therefore, no justification for not giving effect to the literal interpretation of the sections.

Adesanya supports the view of Ayoola, J., mainly on the ground that section 5 of the Australian Matrimonial Causes Act, 1959, which defined 'matrimonial cause' in terms identical with section 114 of the Nigerian Decree, was interpreted by the Australian courts to exclude independent claims for ancilliary reliefs. The learned writer has ignored the fact that independent actions for maintenance in Nigeria are brought under section 70(1) which is identical with section 84(1) of the Australian Matrimonial Causes Act 1959-1966, and not under section 114, which is identical to section 5 of the Australian Act.

The decisions which hold that independent actions for maintenance can be instituted under the Decree are based, not on an interpretation of section 114 of the Decree, but on section 70 of the Decree. These decisions in fact admit that an independent action for maintenance is not a

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1. See also Obadara and Ors. v. The President, Naadan, West District Customary Court [1964] 1 ALL N.L.R.336; Nablan v. Nablan [1967] ALL N.L.R.47.

2. [197] 4 C.C.H.C.J. 769.

3. [1970] Suit No. M/63/70, unreported decision of Lagos High Court delivered on 4 December, 1970.

'matrimonial cause',[1] but maintain that such actions are nevertheless permissible under section 70 of the Decree.

Section 114 merely defines a matrimonial cause, and does not state whether only matrimonial causes as defined under the section may be entertained by the Courts under the Decree. Similarly, while section 1(1) of the Decree provides that a matrimonial cause shall not be instituted otherwise than under the Decree, it does not prevent the Courts from entertaining suits which are not matrimonial causes as defined by section 114, under the Decree. In other words, nowhere in the Matrimonial Causes Decree is there a provision that only matrimonial causes as defined by section 114, may be brought under the Decree. If it was the intention that such actions should not be brought, there is an obvious lacuna in the law.

In view of these conflicting decisions and opinions, no positive statement as to whether an independent action for maintenance can be brought under the Matrimonial Causes Decree, 1970 can be given at this stage. The position must be regarded as undecided until an authoritative interpretation of the section is given by the Supreme Court, but the weight of authority favours the view that an independent action for maintenance is permissible under section 70(1).

If the definitive view of the Supreme Court is that such actions cannot be brought under the Decree, it would mean that a spouse cannot bring an action for maintenance or the custody of the children of the marriage, unless it is related to a concurrent, pending, or completed

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1. See Odive v. Obor where the Supreme Court held that the common law claim for the return of children of the marriage was not a matrimonial relief within the meaning of sections 54(3) and 114(1) of the Matrimonial Causes Decree, 1970, and could not be brought by petition under the Decree; see also Falobi v. Falobi [1974] 4 W.S.C.A. 198, where it was held by the Western State Court of Appeal that an independent action for maintenance is not a 'matrimonial cause' therefore it could be enforced otherwise than under the Decree, i.e. it was not prohibited by S.1(1) of M.C.D. 1970.

proceeding for a principal relief such as divorce, judicial separation, nullity, or restitution of conjugal rights. This would result in great hardship to wives, who have no desire or means to divorce their husbands, or to institute any other 'matrimonial cause', but who wish to get custody of their children, and maintenance for themselves and such children. Unlike England,[1] Magistrates' courts in Nigeria have no jurisdiction to grant maintenance to wives of a statutory marriage, whose husbands have wilfully neglected to provide reasonable maintenance for them or any dependent child of the family.

THE TERMINATION OF MARRIAGE

A statutory marriage may be terminated:

(1) by a decree of divorce pronounced by a court of competent jurisdiction; or

(2) by the death of either party to the marriage.

5. Divorce

A. General introduction.

Dissolution of a statutory marriage differs in many significant respects from divorce in a customary or Islamic law marriage. It has been seen[2] that in customary law, divorce is a personal matter between the spouses and their families, and in most cases, may be effected by mutual consent without the intervention of any judicial or other authority. Unilateral divorce by either spouse is

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1. See Matrimonial Proceedings (Magistrates' Courts) Act, 1960, S.1(1)(h) and (1). As long ago as 1878, the Matrimonial Causes Act 1878 gave Magistrates the power to make a separation and maintenance order in favour of a wife whose husband had been convicted of an aggravated assault on her. In the Magistrates' courts a wife without dependent children is not entitled to full maintenance unless she can produce evidence of her incapacity to support herself. See Gengler v. Gengler [1976] 1 W.L.R.275.

2. See above, chapter VIII and IX.

possible in many cases. Similarly, in Islamic law, divorce by the husband, or by the wife with the husband's consent, is easily achieved without the intervention of the Court. No specific reasons need be advanced to justify a divorce under customary or Islamic law.

With the advent of statutory marriage, and the consequent adoption of English laws of divorce, the position has changed radically. The substantive rules and procedure of English divorce laws have been applied to statutory marriage, and in some cases have even been adopted in the enactment of rules of customary law by local authorities.[1]

Customary Courts, especially in the Western States, where trained lawyers are employed as judges, have also introduced into customary divorce law many of the specific ideas inherent in English divorce law. For example, in Kadiri M. v. Kadiri S.,[2] an appeal decision of Ijebu-Ode Grade B Customary Court, the wife petitioned for a divorce on the ground that she was pregnant by another man. The husband claimed that she was pregnant for him (the husband). The trial court sent her for a medical examination, which confirmed that she was four or five months pregnant. Without hearing further evidence, the Court granted the divorce. On appeal against this decision it was held that:

> Divorce is not such a claim as should be granted just for the sake of it without recording the causes for the claim, even where the defendant raises no objection against the divorce being granted to the

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1. See e.g. Section 7 of The Marriage, Divorce and Custody of Children Adoptive Bye-Laws 1958 of the former Western State, W.R.L.N. 456 of 1958, which provides specific grounds, similar to those of a statutory marriage, on which a customary law marriage may be dissolved. The Marriage, Divorce and Custody of Children Bye-Laws enacted by the Ibadan District Council in 1965 has not adopted some of these grounds, e.g. the provision that 'No divorce order would be granted to a wife nursing a child under three years, or a wife who has three or more children for the husband', has not been adopted.

2. [1959] Appeal No. 7/59, Record Book, Vol.1/59, cited by R.O. Ekundare in Marriage and Divorce Under Yoruba Customary Law, 1969, p. 45.

plaintiff.

It was further stated that where collusion is proved it is a bar to divorce and therefore the court 'must be satisfied that there was no collusion'.

The concept of collusion is evidently an innovation into customary law. Collusion in English law is an agreement between the petitioner, and the respondent, whereby the initiation of a divorce suit is procured, or its conduct provided for,[1] and it is usually made with corrupt intent to pervert the course of justice.[2] Thus, it is collusion to agree to commit adultery in order to provide a ground for divorce,[3] or to agree not to claim maintenance if divorce proceedings are not defended.[4] Where a court finds that collusion exists, it may grant or refuse a divorce, in its discretion.

Collusion is unknown to traditional Yoruba customary law, since divorce by mutual consent of the spouses, effected by refund and acceptance of dowry, has always been possible. Resort to a court to obtain a divorce never was, and is not now, compulsory under customary law.

In Kadiri M. v. Kadiri S.,[5] there was obviously no agreement between the spouses to pervert the course of justice, since the husband objected to the divorce and claimed paternity of the wife's child. It is therefore difficult to see how collusion could have been inferred from the facts of the case, even if collusion has now become a principle of divorce in Yoruba customary law.

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1. Gosling v. Gosling [1968] P.1.

2. Noble v. Noble [1964] P.250,C.A.; 1 ALL E.R. 769.

3. Scott v. Scott [1913] P.52; a request by one side to provide evidence of past adultery is not collusion.

4. Emanuel v. Emanuel [1946] P.115; Mulhouse v. Mulhouse [1966] P.39.

5. [1959] Appeal No. 7/59, Record Book, Vol. 1/59, unreported decision of Grade B, Customary Court, Ijebu-Ode.

The chief differences between dissolution of a customary or Islamic law marriage on the one hand, and of a statutory marriage on the other, are:

(i) divorce in a statutory marriage may be effected solely by a decree of dissolution of the marriage pronounced by a court of competent jurisdiction;

(ii) a party suing for dissolution of a statutory marriage must prove one or more specific grounds to justify his claim;

(iii) under the Matrimonial Causes Decree, 1970, which now governs divorce in a statutory marriage, there is complete equalisation of status of husband and wife.

These differences will now be discussed:-

B. Jurisdiction in divorce cases.

Under the Republican constitution of Nigeria,[1] the Federal Government has exclusive power to make laws with respect to matrimonial causes, including the dissolution of marriages, in all marriages 'other than marriages under Moslem law or other Customary law'. The Federal Government therefore has exclusive power to make laws with respect to the dissolution of a statutory marriage. In exercise of this power, the Federal Government conferred jurisdiction in divorce on the then Regional High Courts.[2] This exclusive jurisdiction of the High Court in divorce matters has been maintained by the Matrimonial Causes Decree, 1970, which has conferred jurisdiction in matrimonial causes, including divorce, on the High Courts of every State of the Federation.[3]

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1. See The Constitution of the Federal Republic of Nigeria, 1963, No.20 of 1963, S.69, Item 23, Exclusive Legislative List, Schedule (Part 1); and Constitution of the Federal Republic of Nigeria, 1979, S. 4(3); Item 58, Exclusive Legislative List, Second Schedule, Part 1, which speaks of 'Islamic and customary law'.

2. Regional Courts (Federal Jurisdiction) Act, S.3, Cap.117, Laws of the Federation of Nigeria, 1958, now cited as the State Courts (Federal Jurisdiction) Act.

3. Matrimonial Causes Decree, 1970, S. 2(1).

A spouse domiciled in Nigeria[1] may institute divorce proceedings in the High Court of any State, whether or not he or she is domiciled in that particular State.[2] It is therefore possible for a spouse domiciled and resident in Calabar, to bring a petition for divorce in Sokoto, hundreds of miles away, and thus cause hardship to the other spouse who wishes to defend the suit, and who may also be living in Calabar. The hardships to which this provision may give rise are somewhat ameliorated by section 9(2) of the Decree which gives a court in which a divorce suit has been initiated, a discretion, in the interests of justice, to transfer the petition to another court having the jurisdiction to hear and determine the petition. The court may exercise its power of transfer at any time, and at any stage of the proceedings, either on application by any of the parties, or of its own motion.[3]

The necessity to resort to a High Court in order to obtain a divorce is of dubious advantage to women. While on the one hand, it affords some protection, in view of the fact that a wife may not be divorced without her knowledge, as is possible in customary or Islamic law, and without an opportunity to contest the divorce petition, on the other hand, it may also operate as an effective bar

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1. A husband who is not domiciled in Nigeria cannot obtain a divorce in Nigeria. A foreign national domiciled in Nigeria can obtain a divorce in Nigeria, see George v. George [1974] 1 N.M.L.R.171.

2. From 1951, when Nigeria became a Federation, until the enactment of the M.C.D.,1970, there were conflicting decisions as to whether there was a single Nigerian domicile or whether each Region (later State) constituted a separate domicile; see Nwokedi v. Nwokedi [1958] LLR. 94; Odiase v. Odiase [1965] 2 ALL N.L.R.91; [1965] N.M.L.R. 196; Udom v. Udom [1962] LLR.112; Odunjo v. Odunjo [1964] LLR.43 which held that there was a single domicile; Cf. Okonkwo v. Eze [1960] N.N.L.R.80; Arinze v. Arinze [1966] N.M.L.R.155; Machi v. Machi [1960] LL.R.103; Uchendu v. Uchendu [1962] LL.R.101; Adeoye v. Adeoye [1962] N.N.L.R. 63; Adeyimi v. Adeyimi [1962] LL.R.70, where the contrary view was expressed.

3. Matrimonial Causes Decree, 1970, S. 9(2).

to a woman who earnestly wishes to divorce her husband, but who cannot afford the expenses involved in a High Court divorce. Even where both spouses agree to a divorce, needless expense and time have to be spent in complying with the formalities of a divorce.[1] There are no special courts dealing with matrimonial and kindred matters only, and there may be a considerable length of time between initiation of a divorce suit, and the grant of a decree absolute.

Another disadvantage of High Court procedure for divorce is the publicity it entails. Intimate details of the spouses' private life are made matters of public knowledge and comments. The divorce proceedings must usually be held in open court, and may be reported by the press. In Oviasu v. Oviasu and Anor[2], the trial court Judge, of his own volition, heard a petition for divorce in his chambers. Although the hearing of the case in the chambers of the learned Judge was not made a specific issue in the grounds of appeal to the Supreme Court, the Counsel for the appellant drew the attention of the Court to the fact that such a proceeding was irregular. The Supreme Court held that the learned trial Judge should not have decided on his own to hear the petition in chambers, because the Judge's chambers are not a court hall to which the public would normally have access. The Court quoted with approval the judgment of the Privy Council in McPherson v. McPherson[3] as follows:

> So long as divorce, in contrast with marriage, is not permitted to be a matter of agreement between parties, the public at large - their Lordships are not now referring to the prurient minded among them who revel in the unsavoury details of many such cases - but the public at large are directly interested in them, affecting as they do, not only the status of the two individuals immediately concerned but,

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1. Cf. the present position in England where there is a special procedure available for divorce by mutual consent, see below, p. 247, n.3.

2. [1973] 11 S.C.315.

3. [1936] A.C. 177.

> not remotely when taken in the mass, the entire social structure and the preservation of a wholesome family life throughout the community.
> .....
>
> And there is, perhaps no available way to correct these tendencies more effectively than to require that the trial of these cases shall always take place, and in the fullest sense, in open court. This requirement must be insisted upon because there is no class of case in which the desire of parties to avoid publicity is more widespread. There is no class of case in which in particular circumstances, it can be so clearly demonstrated even to a judge that privacy in that instance would be both harmless and merciful.
>
> Again, publicity goes far to prevent the trial of these actions, where one is superficially so much like another, from becoming stereotyped and standardized, so that the ability to dispose of them with a minimum expenditure of judicial time is even now, apparently, regarded in some quarters as the convincing test of judicial efficiency.
>
> Moreover, the potential presence of the public almost necessarily invests the proceedings with some degree of formality. And formality is, perhaps, the only available substitute for the solemnity by which, ideally at all events, such proceedings, especially where the welfare of children is involved, should be characterized. That potential presence is at least some guarantee that there shall be a certain decorum of procedure. If at other public sittings of the Court it is the rule for both judge and counsel to be robed, it is pessimi exempli that for the trial of an undefended divorce case the gown of ceremony should be discarded.[1]

The Supreme Court were of the opinion that the petition and answer did not contain such matters as by law ought to be heard in 'camera' in a court room and held that

> It is of the essence of justice that it should not only be done but that it should be seen to be actually done. Any act of secrecy,

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1. Oviasu v. Oviasu [1973] 11 S.C. 315 at p. 326-327.

> however desirable it might seem, detract from the aura of impartiality, independence, publicity and unqualified respect which enshrouds "justice given without fair or favour". Its acceptance by the public at large, and the confidence it demands depend on these aura [sic] being strictly adhered to. These attributed [sic] have been considered so fundamental that they are enshrined in our constitution.[1]

The question how far justice in matrimonial relations should not only be done but be manifestly seen to be done, and how far the parties, or either of them should be entitled to claim a right to secrecy, is a difficult one. The Matrimonial Causes Decree, 1970, which provides that jurisdiction thereunder should be exercised in open court, also provides that, where the court is satisfied that there are special circumstances that make it desirable, in the interests of the proper administration of justice, that the proceedings, or any part of them, should not be heard in open court, the court may order that any persons not being parties to the proceedings, or their legal advisers, shall be excluded during the hearing of the proceedings, or part of the proceedings, as the case may be.[2] What special circumstances would merit this procedure is not

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1. Ibid., p. 324; see Constitution of the Federation of Nigeria 1963, Ss. 22(1) and 22(3) and Order 25, Rule 3 of the High Court (Civil Procedure) Rules of the Western Region of Nigeria, 1959, which applied in the present case.

2. But see Federal Constitution, 1963, S. 22(3)(a) which provides:

> (a) a court or such tribunal may exclude from its proceedings persons other than the parties thereto in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of twenty-one years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice;

stated in the Decree,[1] but there have been many divorce cases where scandalous matters have been given in evidence in open court to the embarrassment of the parties and their families.[2]

In comparison, a customary law marriage may be dissolved in relative secrecy. Even where a divorce is granted by a Customary Court, there is little opportunity for the proceedings to be reported in the national press, nor is the judgment liable to be made the subject of a precedent to be cited in future cases, unless an appeal is made to the High Courts.[3]

There is evident need for separate divorce courts and a simple and less expensive procedure for obtaining a divorce, especially when both parties have conceded the fact that their marriage has broken down irretrievably. Greater privacy should also be given to divorce suits, provided that the administration of justice is not unduly jeopardised.

As will be seen shortly, the grounds for obtaining a divorce have been considerably liberalized. Much of the advantages of this liberalization will be lost if the expensive and cumbersome procedure for obtaining the divorce

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1. See Apara v. Apara [1968] 1 ALL N.L.R. 241 where the Supreme Court held that 'the matter of custody of children of a broken marriage is important to the parties as well as to the community and not only should this be argued in court but judges should in appropriate cases retire into chambers and discuss this fully with counsel [sic] on both sides and their clients before making a final order in court'.

2. See e.g. Okala v. Okala [1973] 3 E.C.S.L.R. 67; Somorin v. Somorin [1972] 11 C.C.H.C.J. 101.

3. Cf. the special procedure available in England for the grant of decrees by mutual consent. Provided that there are no children of the family arrangements for whom had to be examined by the court under section 41 of M.C.A., 1973, the Registrar would consider the papers (including affidavit evidence). If he was satisfied a decree was pronounced in open court by a judge. No personal attendance or examination of the parties was required under this procedure, - See Practice Direction, 1975, 1 W.L.R. 1594. See also Cretney, Principles of Family Law, op. cit., p. 142. Such a procedure would obviously save costs - Beales v. Beales [1972] Fam. 210 at p. 223.

is retained.

C. Grounds for divorce.

(1) Historical introduction.

Although now contained in a local enactment Nigerian statutory divorce law is a heritage from English law. It may be of interest, therefore, to give a brief description of the background of English divorce law in order to trace the development of the law and to see how far the legal position of women has been enhanced by these developments.

The original sources of English divorce law lie in Roman and Ecclesiastical law.[1]

The Church of England for centuries played the most important role in shaping the ideas of marriage and divorce in England. From the middle of the twelfth century onwards, marriage and divorce were recognized as matters exclusively within the jurisdiction of ecclesiastical courts and the marriage law of England was the Canon law.[2] A valid marriage, once contracted, could rarely be dissolved. Before the Matrimonial Causes Act, 1857,[3] judicial divorce, known as divorce a mensa et thoro, was no more than a form of judicial separation which relieved the petitioner of the duty of cohabitation with the respondent, but did not

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1. For a short history of the practice and procedure in the Ecclesiastical Courts, see the 'historical introduction' in William Rayden, Law and Practice in Divorce and Family Matters in all Courts, 11th edit. by Joseph Jackson, et. al., (London: Butterworths, 1971); B.H. Lee, Divorce Law Reform in England, (London: Peter Owen, 1974), pp. 3-21; O.R. McGregor, Divorce in England: A Centenary Study, (London: Heinemann, 1957), pp. 1-34.

2. See Pollock and Maitland, The History of English Law, op. cit., pp. 367-385; O.R. McGregor, Divorce in England, op. cit., p. 1.

3. 20 and 21 Vict. C. 85.

put an end to the marriage. Apart from death, dissolution of a marriage could only be effected by a private Act of Parliament. Parliamentary divorce, known as divorce a vinculo matrimoni, dissolved the marriage, and enabled the parties to remarry, but the procedure involved was cumbersome, and the expense 'sufficient to put relief beyond the hope of most'.[1] This type of divorce was only obtainable on the ground of adultery.[2]

Women were especially at a disadvantage because of these stringent divorce laws. In most cases the wife was financially dependent on the husband. In addition, adultery alone would not suffice to obtain a divorce in the case of a Bill presented on behalf of the wife: it also had to be shown that the adultery was aggravated (for example, bigamous or incestuous) or that her husband had committed an unnatural offence.[3] Needless to say a wife would be very unlikely to get financial support from her husband for such a purpose.[4]

If she only succeeded in obtaining a divorce a mensa et thoro on the ground of her husband's misconduct, such as cruelty or adultery, she was, in the words of Lord Lyndhurst, speaking in 1856 on the second reading of the

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1. Bromley, Family Law, op. cit., 5th edit., p. 237.

2. For a full historical account of the history of Divorce in England, see First Report of the Commissioners Into the Law of Divorce, 1853 (the Campbell Commission). A brief account is contained in the Finer Report, Report of the Committee on One-Parent Families, 1974, Cmnd.5629, App.5, oo. 91-96; see also Joseph Jackson, The Formation and Annulment of Marriage, 2nd edition, 1969, Chpt.2.

3. See T. v. T [1964] P.85; cf. Statham v. Statham [1959] 1 W.L.R. 842.

4. See J.E.G. De Montmorency, "The Changing Status of a Married Woman", Law Quarterly Review, No.1, 1897, pp. 187-199, at p. 190: 'Forty years ago the vast majority of women were indissolubly tied to their husbands, even though the whole world knew them to be both brutes and monsters'. He observed the great change from 1857 to when he wrote in 1897.

Matrimonial Causes Bill 'almost in a state of outlawry'.[1] The noble Earl observed that from that moment

> She may not enter into a contract, or, if she do, [sic] she has no means of enforcing it. The law, so far from protecting, oppresses her. She is homeless, helpless, hopeless, and almost destitute of civil rights. She is liable to all manner of injustice, whether by plot or by violence. She may be wronged in all possible ways, and her character may be mercilessly defamed; yet she has no redress. She is at the mercy of her enemies.[2]

The learned Earl asked:

> Is that fair? Is that honest? Can it be vindicated upon any principle of justice, or mercy, or of common humanity.[3]

Many answered 'no' to his question, including John Stuart Mill who described marriage in England as 'the only actual bondage known to our law', and the mistress of every house as "the only legal slaves remaining after the abolition of slavery".[4]

The situation of the Victorian wife in this respect compares unfavourably with her Nigerian counterpart during the same period.[5]

By the time of the reception of English law into Nigeria, however, divorce laws in England had been completely revolutionized by a series of acts, beginning with the Matrimonial Causes Act 1857.[6] In addition to vesting the

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1. Hansard's Parliamentary Debates (House of Lords) Third Series, Vol. CXLII, col.410, 20 May 1856.

2. Ibid., col.410.

3. Ibid.

4. John Stuart Mill, The Subjection of Women, 1869, Everyman's Library, 1974, p.225.

5. See above, Chapters IV-VIII.

6. In 1857 there had been in England, since the Reformation, 317 divorces by Act of Parliament. In 1887, 7,321 applications for divorce or judicial separation were successful, see Haydon's Dictionary of Dates, 20th Edition, 1892.

existing jurisdiction of the Ecclesiastical courts in a new statutory Divorce Court, the Act, for the first time in English law permitted a marriage to be dissolved by judicial process. As before, adultery remained the only matrimonial offence regarded as sufficiently grave to justify the dissolution of a marriage, and the discriminatory provision against women was retained. Whilst one act of adultery by a wife gave the husband the right to petition for divorce, she had to prove that his adultery was 'aggravated'. This she could do by proving that in addition to adultery, he was guilty of bigamy, rape, cruelty, or desertion for at least two years.[1] It was not until 1923[2] that the wife was allowed to petition for divorce on the ground of her husband's adultery alone.

There were further amending Acts, particularly in 1937 when the Matrimonial Causes Act, 1937[3] was passed. The Matrimonial Causes Act, 1965[4] consolidated previous divorce legislation and was the last English Act applied in Nigeria in relation to divorce. In 1970, a local statute, the Matrimonial Causes Decree was enacted. This Decree now governs the dissolution of statutory marriages in Nigeria.

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1. Matrimonial Causes Act, 1857, S.27. The Parliamentary debates in 1857 were largely concerned with the question whether a wife should be treated differently from her husband, see Hansard's (H.L.) Debates (3rd Series) Vol. CXLV, col. 502. The justification for the discrimination were, among others that (a) 'it was possible for a wife to pardon a husband who had committed adultery; but it was hardly ever possible for a husband ever really to parden the adultery of the wife.' Hansard (3rd ser.) Vol. CXLV, col.490; (b) the possibility of a wife foisting spurious children on the husband, (c) the wife might infect her husband with a contagious disease. The fact that an adulterous husband could also infect his innocent wife was not considered.

2. Matrimonial Causes Act, 1923.

3. See Matrimonial Causes Act 1937, Matrimonial Causes Act, 1950, Matrimonial Causes Act, 1963.

4. C.72, 17 Stats. 157.

(2) Grounds for divorce (pre-1970).

Prior to the Matrimonial Causes Decree, 1970,[1] the only grounds on which a statutory marriage could be dissolved in Nigeria, were adultery or cruelty committed since the celebration of the marriage, unjustified desertion for a period of at least three years immediately preceding the presentation of the petition, or (subject to certain other conditions), supervening incurable insanity.[2]

In addition, a petition could be brought in the case of the wife only, if the husband, since the marriage, had been guilty of rape, sodomy or bestiality.[3]

The underlying principle of the divorce law previous to the Decree was that there should be a restriction on the availability of divorce, but at the same time, the law should not be so harsh as to lead to its disregard, encouraging the formation of illicit, if permanent, extra-marital relationships. Thus a matrimonial offence by one party to the marriage was a prerequisite to a divorce. In addition, the other party must be relatively free from guilt and justly aggrieved by the other's behaviour. Hence, connivance[4], condonation[5] and collusion[6] were absolute bars[7]

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1. Decree No. 18 of 1970.

2. See Matrimonial Causes Act 1965 (England), S.1(1).

3. M.C.A., 1965, S.1(1).

4. Connivance means consent to, or acquiesence in adultery committed by the other spouse: it is a bar based on the principle volenti non fit injuria, i.e. one cannot complain of an act to which one has freely consented; per Denning, L.J., Douglas v. Douglas [1951] p. 85, 96.

5. Condonation is the reinstatement of a spouse who has committed a matrimonial offence, to his or her former matrimonial position with knowledge of all the material facts - per Sir J. Simon P., Inglis v. Inglis [1968] P. 639,651; Rosanwo v. Rosanwo [1961] W.R.N.L.R. 297.

6. Collusion means an agreement or bargain between the parties whereby the initiation of the suit was procured, or its conduct provided for, see Mulhouse v. Mulhouse [1966] P.39.

7. Matrimonial Causes Act, 1857, S.30.

to a petition, and the petitioner's own adultery, delay, cruelty, desertion, or conduct conducive to adultery were discretionary bars.[1]

There was no possibility of obtaining a divorce if the innocent party did not want one, and where both parties were innocent, divorce could only be obtained by resort to dishonest means by one or both parties.[2] Hence, many marriages which had obviously broken down, retained the legal shell, because divorce was not possible. The law causes hardships, particularly to those who wished to remarry, but were unable to do so because an existing marriage could not be dissolved.

(3) The Modern Social Policy of Divorce.

The retention of a matrimonial offence as the basis of divorce law came under increasing attack in England after 1937. The principle that if a marriage had broken down, no public interest was served by keeping it legally in existence became increasingly accepted. It was argued that divorce should be available to either spouse when the marriage has irretrievably broken down: to insist on the commission of a matrimonial offence lays stress upon the symptoms of breakdown rather than on the breakdown itself.

The introduction of this principle would have the effect of reducing the number of stable illicit unions where there was no foreseeable chance of the parties being able to marry, or of their children being legitimated, because the spouse of one of them refuses to release his or her partner, on account of moral scruple, financial advantage, or vindictiveness.[3]

Not every one contributed to this view. Some people argued that the irretrievable breakdown principle would enable a party to take advantage of his or her own

1. Ibid., S.31.

2. Notably in the so-called Hotel cases, in which husband and wife agreed on a divorce, and the husband would then arrange to provide evidence of adultery. See A.P.Herbert, Holy Deadlock, 1934; see also C.P. Harvey, 'On the State of the Divorce Market' 16, M.L.R. 129, esp. 131-132.

3. See Bromley, Family Law, op. cit., p. 239.

wrong, and obtain a divorce against the will of an innocent spouse. The wife, in particular, might suffer serious financial hardship if such a liberal attitude to divorce was taken. The most serious consequences said to follow from the ready availability of divorce is that this by itself creates 'a habit of mind in the people' which weakens the security of marriage. The arguments of Hume and Paley have been cogently summarised by Lord Stowell in this much quoted passage:

> The general happiness of the married life is secured by its indissolubility. When people understand that they must live together, except for a few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off, they become good husbands and good wives from the necessity of remaining husbands and wives; ...[1]

The 'Morton' Commission of 1956 took a similar view. They considered that the 'root of the problem' of easy divorce was

> a tendency to take the duties and responsibilities of marriage less seriously than formerly ... there is less disposition to overcome difficulties and to put up with rubs of daily life and, in consequence there is an increasing disposition to regard divorce, not as the last resort, but as the obvious way out when things begin to grow wrong.[2]

The English Divorce Reform Act, 1969[3] was a compromise between these two conflicting views. The basic principles of the Act are:

(i) breakdown of the marriage should be the sole ground for divorce, but

(ii) breakdown is to be inferred from the proof of one of a number of facts most of which are akin to the old matrimonial offences but with the addition of (a) two years separation (reduced to one year in the Nigerian

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1. Evans v. Evans [1790] 1 HAG.CON.35, 36-37.

2. (Morton) Royal Commission on Marriage and Divorce, Cmnd.9678 (1956), par. 47.

3. 40 Stats. 768.

Decree if the respondent consents, or (b) five years separation (three years in Nigeria) if he or she does not.

The basic principles, with some modifications were adopted by the Nigerian Matrimonial Causes Decree, 1970. The Decree has been criticized on the ground that 'there was no known public debate or group discussion of the policy behind, or the imports of the Decree before its enactment', and that 'legislation which invariably touches the lives of many people in the country was shrouded with unnecessary secrecy'.[1] Another criticism is that it is mainly based on imported foreign law.[2]

While there can be no valid defence to the first criticism, especially when one bears in mind the public debate which preceded the enactment of the recent English divorce law, it is submitted that the central theme of the divorce law enshrined in the Matrimonial Causes Decree, 1970, is not entirely foreign-oriented. Irretrievable breakdown of marriage has always been the traditional ground for the dissolution of a customary law marriage, since the families of the spouses never agreed to a divorce until they were satisfied that reconciliation was no longer possible. This principle has now become a part of modern divorce law. The Decree makes irretrievable breakdown the only ground for the dissolution of a marriage, and this approximates more closely to divorce in customary and Islamic law, than the divorce laws it replaced. Divorce by mutual consent, or by unilateral desire to dissolve the marriage, is now possible for a statutory marriage, as it has long been in most systems of customary and Islamic law marriages. Viewed from this aspect, therefore, the Decree

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1. Adesanya, Laws of Matrimonial Causes, op. cit., p. 2.

2. Ibid., p. 36; see also A.B. Kasunmu, 'Matrimonial Causes Decree, 1970: A Critical Analysis', Nigerian Lawyers Quarterly, Vol.5, pp. 1-30 at p.1; and Nigerian Journal of Contemporary Law, 1971, pp. 88-212 at p. 88.

has introduced no startling innovations into Nigerian traditional legal systems, and cannot be said to be entirely of foreign origin.

(F) Grounds for divorce under the Matrimonial Causes Decree, 1970.

Section 15(1) of the Decree provides that a petition for a decree of dissolution of the marriage may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably. The court hearing a petition for divorce shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the court of one or more of the following facts:

(a) that the respondent has wilfully and persistently refused to consummate the marriage;

(b) that since the marriage the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(c) that since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

(d) that the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;

(e) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition, and the respondent does not object to a decree being granted;

(f) that the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition;

(g) that the other party to the marriage has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made under this Decree;

(h) that the other party to the marriage has been

> absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

The Matrimonial Causes Decree, 1970, has been in operation in Nigeria for over eight years, and during this time, hundreds of divorce cases have been decided under its provisions. While there has been no significant divergence of judicial interpretation of some of the sections, there are a few instances of judicial conflict arising from varying interpretations of certain provisions of the Decree. One such conflict of opinion has already been noted in connection with an independent action for maintenance under the Decree. It is not possible to discuss here all the provisions of the Decree relating to divorce,[1] and the most that can be conveniently attempted in this thesis is to discussion of some of the problems of interpretation which have confronted the Nigerian courts in divorce cases, and the attitudes different judges have taken in regard to particular issues especially relevant to the legal status of women. Significant changes in the law relevant to the legal status of women will also be noted.

In a few cases, decisions of the English courts in divorce petitions will be discussed, in order to compare the various attitudes which English judges have taken to the same or similar provisions. Such references are particularly useful as the Nigerian Supreme Court, the highest court in Nigeria, has not yet had much opportunity to give its own authoritative interpretation of some of the provisions of the Decree, corresponding to provisions of the English Act. Indeed interpretations of the English

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1. For fuller discussions of the M.C.D.1970, see Adesanya, Laws of Matrimonial Causes, op.cit.; A.B. Kasunmu, 'The Matrimonial Causes Decree 1970: A critical assessment', Nigerian Lawyers Quarterly, Vol. V, pp. 1-30; also Nig. J. Contemp. Law, 1971, pp. 88-212; Kariba-White, 'Matrimonial Causes Decree, 1970: Comments on Some Aspects of', Nig. J. Contemp. Law, 1970; Nwogugu, Family Law in Nigeria, 1974.

Appeal Court have not in many cases received confirmation from the House of Lords, the highest English Appeal Court. Although English decisions at any level are not binding on Nigerian courts, they have persuasive authority and continue to be frequently cited by Nigerian judges. Consequently, English decisions indicate the possible view which might be taken by the Nigerian Supreme Court when similar cases come before it.

(G) Problems of interpretation and reform.

(1) Divorce based on the 'sole' ground.

The first question which needs to be answered is: are there several grounds, or only one ground for a divorce under the Matrimonial Causes Decree, 1970. As previously seen, prior to the enactment of the Decree which came into force on 1 March, 1970, a divorce could be obtained on one or more of several grounds.[1] Has the Decree changed the law, and provided one 'sole' ground on which a marriage may be dissolved, or has it retained the 'several grounds', of its predecessors?

Adesanya[2] submits that the Decree still provides 'grounds' rather than a 'ground' for divorce, and he bases his submission mainly on the fact that, while the English Divorce Reform Act, 1969,[3] used the phrase 'the sole ground on which a petition for divorce may be presented',[4] the Nigerian Decree omitted the word 'sole' in the similar

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1. See Matrimonial Causes Act, 1965, S.1.

2. S.A. Adesanya, Laws of Matrimonial Causes, op. cit., pp. 37-40.

3. This Act was repealed, but was substantially re-enacted in the consolidating Matrimonial Causes Act, 1973.

4. Section 1, Divorce Reform Act, 1969.

section 15(1) of the Decree, which simply states 'the ground on which a petition for divorce may be presented'.

It is respectfully submitted that while the word 'sole' emphasizes the fact that there is only one ground for divorce, its omission from the Nigerian Decree does not permit an interpretation that there is more than one ground. The English Matrimonial Causes Act, 1973, a consolidating statute which repealed the Divorce Reform Act, 1969, has also omitted the word 'sole' in its provisions,[1] and, like the Nigerian Decree, simply states 'the ground' that the marriage has broken down irretrievably. Nevertheless, it is still the general view that there is only one ground for divorce in England.[2]

Adesanya also supports his contention that there are still several grounds for divorce, by the fact that the marginal note to section 15 of the Decree mentions 'Grounds for dissolution of marriage'. The learned writer contends that marginal notes are 'helpful in resolving ambiguities or doubts'. This seems an example of looking for a problem to fit a solution. It is respectfully submitted that there is no ambiguity or doubt in section 15 of the Decree which may be resolved by calling in aid the marginal note.

It is clear that there is only one ground for divorce under the Decree that is that the marriage has broken down irretrievably.[3] Irretrievable breakdown, however, can only be established by proving one or more of the eight facts set out in section 15(2) of the Decree. The position was correctly stated by Dosunmu, J., in Williams v. Williams,[4] where he said:

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1. See Section (1(1) M.C.A., 1973.

2. See S.M. Cretney, Principles of Family Law, op. cit., p. 118; Olive M. Stone, Family Law, 1977, p. 5; Bromley, Family Law, 1976, p. 244.

3. M.C.D., 1970, section 15(1); Egbueje v. Egbueje [1972] 2 E.C.S.L.R. 747.

4. [1970] Suit No. IAD/12/69, unreported decision of 1 June, 1970, cited by Kasunmu in 'The Matrimonial Causes Decree, A Critical Analysis', op. cit., pp. 17-18.

> True it is that the new Matrimonial Causes Decree introduced some radical changes in the law of divorce, but a party must come within its four walls before he will succeed. It is not sufficient for him or her to say 'my marriage has irretrievably broken down and I can no longer live with my partner'.

The petitioner must establish the fact that the marriage has broken down irretrievably by proving one or more of the eight specified facts on which a court must hold that the marriage has broken down.[1] Although some of these facts[2] resemble the former grounds for divorce, they cannot be strictly regarded as grounds. They are conclusive proof of the fact that a marriage has broken down irretrievably.[3] Nigerian courts have stated repeatedly, that the sole ground for the dissolution of a marriage under the Decree is the irretrievable breakdown of the marriage.[4]

The factual situations which demonstrate the irretrievable break-down of a marriage under section 15 will now be discussed.

(2) Wilful and persistent refusal to consummate.

Wilful and persistent refusal to consummate a

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1. Section 15(2) Matrimonial Causes Decree, 1970. See the English case of Richards v. Richards [1972] 3 ALL E.R. 693; where Rees, J., dismissed a petition for divorce because, although the petitioner had established that the marriage had broken down irretrievably, she had not established one of the facts required to prove break-down. This judgment was delivered, although Rees, J., was well aware that in a further nine months the petitioner would almost inevitably succeed under the two years 'living apart' provision.

2. For example, adultery under S.15(2)(b); desertion under 15(2)(d).

3. See Omo-Ogunkoya v. Omo-Ogunkoya [1974] 5 C.C.H.C.J.1057 at p. 1060.

4. See Omo-Ogunkoya v. Omo-Ogunkoya [1974] 5 C.C.H.C.J.1057; Segun v. Segun [1975] 6 C.C.H.C.J., 773.

marriage connotes a settled and definite unjustifiable decision not to consummate the marriage,[1] which must persist up to the time of the commencement of the hearing of the suit.[2]

A marriage is said to be consummated if the parties have sexual intercourse after the celebration of the marriage,[3] even though one or both parties are sterile. Wilful refusal is therefore refusal to have ordinary and complete sexual intercourse.[4]

What constitutes wilful and persistent refusal is a question of fact to be decided after consideration of the whole history of the marriage. There must be evidence that the petitioner has made persistent requests for sexual intercourse, and that these requests have been unreasonably refused by the respondent. What is unreasonable refusal is a question of fact to be decided by the judge in the particular circumstances of the case. Thus in Dolor v. Dolor[5], the husband lived with the wife in Nigeria for two

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1. Horton v. Horton [1947] 2 ALL E.R.871; cf. Potter v. Potter [1975] 5 Fam. 161, C.A.

2. Section 21, M.C.D., 1970; see Oladele v. Oladele [1972] 12 C.C.H.C.J.119; S. v. S. (otherwise W.)[1962]2 ALL E.R. 816, C.A.; and S. v. S.[1954] 3 ALL E.R.736, where it was held that a wife's defect aired at the second hearing of the petition was not wilful refusal but indecision to see a doctor. Cf. Ogunmuyiwa v. Ogunmuyiwa [1965]2 ALL N.L.R.236, decided before 1970 where it was held that refusal must persist to the date of the petition.

3. Intercourse before the solemnization of the marriage will not suffice, cf. Dredge v. Dredge [1947] 1 ALL E.R.29.

4. See Baxter v. Baxter [1947] 2 ALL E.R.886, H.L.[1948] A.C.274 - refusal to have intercourse unless a contraceptive sheath is used is not a refusal to consummate. For a criticism of this decision see L.C.B. Gower, "Baxter v. Baxter in Perspective", 11 M.L.R., 176-195. The decision overruled two decisions to the contrary, Cowen v. Cowen [1946] P.36; and J. v. J.[1947] P.158, and was a topic of controversy for several years.

5. [1964]M.N.L.R.98; see also Owobiyi v. Owobiyi [1965] 2 ALL N.L.R. 200 ; there must be a request for sexual intercourse by the petitioner which is unjustifiably refused by the respondent.

months after the celebration of the marriage before he left to study medicine in England. No sexual intercourse took place between the parties, and the husband explained to the wife that the reason for not wanting to have sexual intercourse with her was his fear of having children. He asked her not to worry, that everything would be alright after he had qualified. Two years later, the wife joined him in England, where the parties lived in the same house and slept on the same bed. The husband continued in his refusal to consummate the marriage. When the wife persisted, bought contraceptives, and showed them to him, he 'became annoyed and kept malice with her'. Eventually he left her in the house and went to live in another house. The wife brought a petition in Nigeria, on the ground of wilful refusal by the husband to consummate the marriage.

Rhodes-Vivour, J., held that, assuming that the reason given by the respondent to the petitioner after the marriage, and before he left for the United Kingdom, for not wanting to have sexual intercourse with her, was genuine, there was no reason why he should have continued with that same state of mind in the United Kingdom, a place with so many 'Family Planning Centres', or places of that type. In spite of the fact that he was a medical student, he did nothing to prevent the petitioner from getting pregnant, and took no step to consummate the marriage. He held that the respondent's behaviour since the marriage constituted wilful refusal to consummate the marriage.[1]

Wilful and persistent refusal to consummate a marriage may be established within a short period of time after the celebration of the marriage. For example, in the recent case of Aluko v. Aluko,[2] the parties were married

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1. Dolor v. Dolor [1964] M.N.L.R.98 at p. 100.

2. [1975] 12 C.C.H.C.J. 2061. See also Kaur v. Singh [1972] 1 ALL E.R. 292, C.A.; Boggins v. Boggins [1966] C.L.Y 4041 - husband who deserted wife before consummation of the marriage was held to have wilfully refused to consummate the marriage, see Famoriyo v. Famoriyo [1975] 2 C.C.H.C.J.253. Cf. Singh v. Singh [1971] 2 ALL E.R.828.

on 3 August, 1974. From the 4th August to 8th August 1974, when the wife deserted the matrimonial home, she wilfully refused the reasonable requests of the petitioner to have sexual intercourse with him. The petitioner was a widower with three daughters, and a minister of religion. The reason given by the wife for her refusal was that she did not wish to live the secluded life of a minister, and she asserted that she was quite capable of having sexual intercourse. A decree of dissolution of the marriage was granted to the husband on the ground of the wife's wilful and persistent refusal to consummate the marriage.[1]

Under the pre-1970 divorce law, non-consummation of a marriage was treated as a ground for a decree of nullity of marriage.[2] A petitioner was therefore able to plead wilful and persistent refusal to consummate the marriage, or in the alternative, incapacity to consummate the marriage.[3] Under the Matrimonial Causes Decree, however, while inability to consummate a marriage makes the marriage voidable,[4] wilful refusal to consummate is treated as evidence of irretrievable breakdown of the marriage, entitling the other spouse to sue for divorce.[5] This distinction may impose hardship on a petitioner, and involveSunnecessary expense and delay. For example, in many cases, it is difficult for a spouse to ascertain whether non-consummation of the marriage is due to wilful refusal, or incapacity to consummate the marriage.[6]

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1. The divorce was granted within two years of the marriage; see further below, pp. 309-312.

2. See e.g. Ogunmuyiwa v. Ogunmuyiwa [1965] 2 ALL N.L.R.236; Akpan v. Akpan [1968] Suit No. W.D./12/67 of 27 July,1968.

3. See Fajemisin v. Fajemisin [1970] Suit No. 1/190/67 decided on 2 April 1970.

4. Section 5(1)(a).

5. Section 15(2)(a).

6. The most cogent reason advanced by the English Law Commission for the retention of wilful refusal to consummate a marriage as a ground for nullity of the marriage, rather than one for divorce, was the petitioner's uncertainty in some cases whether failure to consummate was due to impotence or wilful refusal - see Law Commission Report No.33, 1970, Nullity of Marriage.

This fact was recognised in the English Law Commission's statement:

> [W]ilful refusal to consummate is in most cases the alternative allegation to impotence as it is often uncertain whether the respondent's failure to consummate is due to one cause or the other; the petitioner may not know whether the respondent refuses to consummate the marriage because he is unable to have sexual intercourse or because, though able to have sexual intercourse, he does not want to have it; in such cases the court must draw an inference from the evidence before it and it seems unreal that the relief granted to the petitioner - nullity or divorce - should depend in any given case on the court's view as to which of the two reasons prevented the consummation of the marriage.[1]

This is especially so in the case of wife petitioners. A petitioner, therefore, has to decide whether to petition for nullity, based on incapacity to consummate, or for divorce, based on wilful refusal, or whether to institute both petitions simultaneously. If the latter course is taken, section 29 of the Decree provides that 'Where a petition for a decree of nullity of a marriage and a petition for a decree of dissolution of that marriage are before a court, the court shall not make a decree of dissolution of the marriage unless it has dismissed the petition for a decree of nullity of the marriage.[2]

Practical expediency would seem to indicate that petitions based on non-consummation of marriage should be treated as grounds for nullity or divorce.[3] This would obviate the necessity for dual petitions, since alternative pleas would be possible, as they were under the old law. The reluctance to accept wilful refusal to

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1. See the Law Commission Report, No.33, 1970, Nullity of Marriage, para. 27(a).
2. Matrimonial Causes Decree, 1970, S.29.
3. See the arguments for and against making wilful refusal a ground for divorce in England, (Morton) Royal Commission, 1956; Law Commission Report, No.33, 1970, Nullity of Marriage, paras. 26-28; see also The Church and the Law of Nullity of Marriage, 1955, pp. 34, 48.

consummate a marriage as a ground for the annulment of the marriage is that it offends against the principle that nullity is granted for some defect or incapacity existing at the date of the marriage, while wilful refusal is something that happens after the marriage.[1] This argument ignores the possibility that incapacity to consummate a marriage may result after the celebration of the marriage. For example, the husband may sustain an injury in an accident occurring immediately after the marriage ceremony, which renders him impotent and therefore incapable of consummating the marriage. Nevertheless, he or his spouse may petition for nullity of marriage, even though his incapacity arose after the marriage. On the other hand, a party to the marriage may have formed the wilful intention not to consummate the marriage before the celebration of the marriage.[2] If this intention persists after the marriage, the other spouse may be entitled to a divorce.

(3) Adultery and intolerability

(a) Adultery

It has been seen that adultery has always been a ground for which a spouse may obtain a divorce. In fact, in the days of a divorce by private Acts of Parliament in England, and for eighty years of judicial divorce there, from 1857 to 1937, adultery was the sole ground for divorce.[3]

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1. See the Morton Commission, op. cit., p. 89; Napier v. Napier [1915] P.184 at p. 189.

2. Wilful refusal almost invariably results from a state of mind which dates back to the time of celebration of the marriage - Lord Hailsham, Hansard's Parliamentary Debates (H.L.) 5th Series, Vol.318, col.941.

3. See above, p. 249.

The Decree has retained adultery as proof that a marriage has broken down irretrievably.[1]

The Decree has not changed the criteria of adultery.[2] Adultery in divorce relating to a statutory marriage, unlike some systems of customary law (where mere touching of hands may be construed as adultery)[3], is only committed when there has been voluntary[4] sexual intercourse between a husband, or wife, and a third party. Although intercourse need not be complete, there must be some degree of penetration of the female organ by the male organ.[5]

Proof of adultery.

It was the general judicial opinion that adultery must be proved beyond reasonable doubt, although the standard of proof is not quite as high as is required in criminal cases.[6] A number of cases[7] decided in Nigeria before the enactment of the Decree had followed the decision in the English case of Ginesi v. Ginesi[8] (which required the standard of proof in adultery cases to be approximated to the standard in criminal cases), and held that allegations of adultery in divorce cases must be proved beyond all

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1. Section 15(2)(b).

2. See Lewis v. Lewis [1960] LL.R.215; Souza v. Souza [1975] 11 C.C.H.C.J., 1861.

3. See above Chapter VII, pp. 559-561.

4. Where a wife is raped, there is no adultery, Clarkson v. Clarkson [1930] 143 L.T.775; Sapsford v. Sapsford [1954] P.394. Cf. Goshawk v. Goshawk [1965] 109 Sol.Jo.290 - a wife's contention that she had not committed adultery because she was intoxicated by drink to such an extent that she was incapable of giving consent was not accepted.

5. Dennis v. Dennis [1955] 2 ALL E.R.51, C.A.[1955]P.153.

6. See Matrimonial Causes Act, 1950, S.4(2). Gower v. Gower [1950] 1 ALL E.R.804, C.A. Preston-Jones v. Preston-Jones [1951] A.C.391; [1951] 1 ALL E.R.124; Davis v. Davis [1950] 1 All E.R. 40

7. See e.g. Lewis v. Lewis [1960] LL.R.215; Akinyemi v. Akinyemi [1963] 1 ALL N.L.R.340. See also S. 137(1) of the Nigerian Evidence Act.

8. [1948] P.179.

reasonable doubt.[1]

Section 82 of the Matrimonial Causes Decree now provides the standard of proof required in all matrimonial causes, including proof of adultery. Section 82 states:

> 82(1) For the purposes of this Decree, a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the court.
>
> (2) Where a provision of this Decree requires the court to be satisfied of the existence of any ground or fact or as to any other matter, it shall be sufficient if the court is reasonably satisfied of the existence of that ground or fact, or as to that other matter.[2]

Has the section changed the standard of proof required in allegations of adultery in divorce suits? In Okala v. Okala[3] Agbakoba, J., stated that the Decree has 'revolutionized the law of Divorce in Nigeria', and that as a result of section 82,

> the rule in Ginesi's case, which required the same standard of proof as in a criminal case, is no longer a valid test, except in so far as a Court might hold that it is not reasonably satisfied if it is not proved beyond reasonable doubt that the adultery was committed; but the Court's view in such a case cannot be of general application.

He held that, although strict proof of a matrimonial offence is necessary, strict proof is not a kind or type, but a degree of proof. Strict proof is a degree of preponderance

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1. The old law as set out in cases like Preston-Jones v. Preston-Jones [1951] A.C.391; [1951] 1 ALL E.R.124 required the criminal burden of proof to be satisfied where there were allegations of adultery, but these were doubted by the House of Lords in Blyth v. Blyth [1966]1 ALL E.R.524; and subsequently the Court of Appeal in Bastable v. Bastable [1968]3 ALL E.R.701, 704 tried to resolve the apparent conflict by adopting an intermediate test of requiring 'a degree of probability commensurate with the occasion'.

2. Section 82 lays down the standard of proof for all matters of fact in the Decree which require proof.

3. [1973]3 E.C.S.L.R.67.

of probabilities, and if the courts exercise 'utmost care in balancing probabilities, and ensure that the evidence clearly preponderates to entitle the petitioner to a decree', the court can be said, within the meaning of section 82 of the Decree, to be reasonably satisfied, not merely satisfied.[1]

While the courts have recognized the provisions of section 82 of the Decree, they have generally held that adultery is such a grave matrimonial offence,[2] that although its commission need not be proved beyond all reasonable doubt, there ought to be clear proof. Thus in Segun v. Segun,[3] it was held that the evidence need not reach certainty, but must carry a high degree of probability, because of the seriousness of the charge.

Direct evidence of adultery is seldom available, therefore, the courts may draw an inference that adultery has been committed, if the facts proved are not reasonably capable of being otherwise explained.[4] Adultery is a question of fact[5]. What are the facts from which the courts may infer that adultery has been established? Mere proof of familiarity between the respondent and the co-respondent is not sufficient to establish adultery.[6] If, however, there was opportunity for adultery to take place, in many cases,

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1. See also Oke v. Oke [1971] Suit No. 1/156/70 unreported, 19 April 1971.

2. Cf. the opinion of Milton, The Doctrine and Discipline of Divorce (Everyman edition, 1957), p. 276: "... he who affirms adultery to be the highest breach, affirms the bed to be the highest of marriage, which is in truth a gross and boorish opinion how common soever , he was of the opinion that the Canon law should regard spiritual and civil companionship, rather than carnal coupling as the true basis of marriage".

3. [1975] 6 C.C.H.C.J.773.

4. Beer v. Beer [1948] P.10.

5. Elumeze v. Elumeze [1969] 1 ALL N.L.R.311.

6. Odulana v. Odulana [1971] Suit No. HD/14/69, unreported, Lagos, High Court, 8 Sept. 1971.

the courts will infer that it did take place. Thus, in Oseni v. Oseni,[1] photographs which showed the respondent wife and the co-respondent dancing close together; and the co-respondent standing close with his left hand around the respondent who was in a seating position, were dismissed as evidence of 'mere amorous familiarity'. But where the petitioner, in the same case, gave evidence of finding the respondent and co-respondent in a locked room, the court held that there was opportunity for adultery to have taken place, and consequently, inferred that it had in fact taken place.[2]

On the other hand in Okafor v. Okafor,[3] Oputa, J., held that proof of adultery must be beyond reasonable doubt.

In Oviasu v. Oviasu,[4] the petitioner appealed on the ground, inter alia, that the learned trial judge misdirected himself in law in failing to observe that Nigerian law in regard to the quantum of proof required to establish adultery, is not the same as in English law. Under Nigerian law, proof is established by the balance of probabilities on the evidence, whilst in English law, there must be proof beyond reasonable doubt. The Supreme Court granted the appeal on another ground, but gave the following directions:

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1. [1972] 12 C.C.H.C.J.110.

2. See also Adeyimi v. Adeyimi [1969] Suit No. HD/32/68, unreported, Lagos High Court, 10 March 1969; Akinyemi v. Akinyemi [1963] 1 ALL N.L.R.340; Oloko v. Oloko [1961] W.N.L.R.101; Lewis v. Lewis [1960] LL.R. 215.

3. [1972] Suit No. O/6D/71, unreported decision of Onitsha High Court, 13 Nov. 1972; see also Souza v. Souza [1975] 11 C.C.H.C.J. 1867; in Odaje v. Odaje [1972] 10 C.C.H.C.J. 97, on a charge of cruelty it was said: 'A charge of cruelty is a very serious charge to make and the court has said over and over again that the party who makes it must prove it beyond doubt. It must be proved with the same degree of strictness as a crime is proved in a criminal court'.

4. [1973] 11 S.C.315, p. 329.

> In order to avoid future pitfalls we wish to emphasise that the provisions of the Matrimonial Causes Decree 1970 govern Matrimonial Causes in Nigeria. There is for example, provision for standards of proof - see Section 82 et seq - and English decisions should no longer be cited as authorities in construing provisions of our law dealing with standard of proof. The provisions of the Matrimonial Causes Decree are clear and can be easily construed under the known and settled principle or canons of construction.

The degree of proof required under the Decree is therefore left largely to the discretion of the individual judge as to what constitutes 'reasonable satisfaction', and whether he is reasonably satisfied in the particular case.

Other examples of circumstances in which the courts have held that adultery had been proved under the Matrimonial Causes Decree may be given.

(a) The husband, who had been living apart from his wife, visited her at night and found her with the co-respondent locked up in a darkened room. When the door was opened, as a result of his knocking, the wife was found sitting on the bed with only a wrapper thrown carelessly around her body, and the co-respondent's shirt was not properly tucked into his trousers.[1]

(b) The wife gave birth to a child whose father could not possibly have been her husband.[2]

(c) The woman cited was seen with the petitioner in his room, both of them sitting on his bed; and in Ogbete market walking hand in hand. It was also alleged that she was living in the official residence of the petitioner. The petitioner admitted that she was living there, but stated

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1. See Adeyemi v. Adeyemi [1969] Suit No. HD/32/68 unreported decision of Lagos High Court, 10 March 1969.

2. See Elumeze v. Elumeze [1969] 1 ALL N.L.R. 311; either party to a marriage may now give evidence proving or tending to prove that the parties to the marriage did not have sexual relations with each other at any particular time - M.C.D. Section 84. See Rone-Orugboh v. Rone-Orugboh [1973] 7 C.C.H.C.J. 80.

that she was not living with him.[1]

(d) An Ibadan Premier Hotel receipt was held to be sufficient evidence of adultery by the respondent with a woman unknown, at the Premier Hotel.[2]

In the following cases, on the other hand, adultery was held not to have been proved to the reasonable satisfaction of the court.

(a) Information given to the wife in anonymous letters that her husband had committed adultery.[3]

(b) Evidence that the co-respondent recently divorced his wife, and was often found with the respondent in her house after she left the matrimonial home. The wife admitted that the co-respondent was her former boy-friend, but denied that adultery had been committed.[4]

(c) The petitioner gave the following evidence: 'The respondent is living with one Magdalene Onyeamara ... Magdalene in September last year gave birth to a baby girl'. Oputa J. held that these two facts were 'left hanging aimlessly', and had not been sufficiently connected with the respondent to prove his adultery.[5]

(b) Intolerability

Adultery simpliciter is no longer sufficient to justify the dissolution of a marriage under the Matrimonial Causes Decree, 1970. The petitioner must also find it intolerable to live any longer with the respondent as

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1. Anoka v. Anoka [1973] 3 E.C.S.L.R.51.

2. Osibo v. Osibo [1975] 1 C.C.H.C.J.119. See also Odunjo v. Odunjo [1964] LL.R.43; evidence of a will providing for the children of the respondent and the woman-named admissible as evidence in corroboration of adultery.

3. Segun v. Segun [1975] 6 C.C.H.C.J. 773.

4. Afolabi v. Afolabi [1975] 6 C.C.H.C.J.949.

5. Ibeawuchi v. Ibeawuchi [1973] 3 E.C.S.L.R. 56.

husband and wife.[1] The failure to state in the petition for divorce, the fact that the petitioner finds it intolerable to live with the respondent, has resulted in the failure of numerous petitions on this ground, in the Nigerian courts.[2]

The question whether or not the petitioner finds it intolerable to live with the respondent has been held in some cases to be a subjective one: does this petitioner find it intolerable to live with this respondent? Provided the court is satisfied that the petitioner actually finds it intolerable to live with the respondent, whether his attitude in the circumstances of the case is reasonable or not is irrelevant. Savage, J., in Soetan v. Soetan and Anor,[3] stated the position thus:

> The words in sec. 15(2)(b) of the Decree 1970 'the petitioner' show quite clearly that the test is subjective. It is therefore the feelings of the petitioner that matter and if he says 'I can no longer live with my wife, I find it intolerable to do so', I do not see how the court could find that this was not so.

A similar reasoning is found in many Nigerian,[4]

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1. M.C.D.1970, S.15(2)(b); Egbueje v. Egbueje [1972] 2 E.C.S.L.R. 747; Okala v. Okala [1973] 3 E.C.S.L.R.67; Ibeawuchi v. Ibeawuchi [1973] E.C.S.L.R.56; Oseni v. Oseni [1972] 12 C.C.H.C.J.110; Labode v. Labode [1972] 2 C.C.H.C.J.107; Eyo v Eyo [1972] 2 C.C.H.C.J.121; Agu v. Agu [1972] 2 E.C.S.L.R.452.

2. See Oseni v. Oseni [1972] 12 C.C.H.C.J.110; Labode v. Labode [1972] C.C.H.C.J.107; Agu v. Agu [1972 2 E.C.S.L.R. 452; Egbueje v. Egbueje [1972] 2 E.C.S.L.R.747; Ajetombi v. Ajetombi [1975] 11 C.C.H.C.J. 2065.

3. [1973] 4 C.C.H.C.J.71; Soetan v. Soetan [1973] 4 C.C.H.C.J., 71, 79.

4. See Arinye v. Arinye [1973] 4 C.C.H.C.J., 81 at p. 83; Labode v. Labode [1972] 2 C.C.H.C.J. [1972] LL.R.107; Adebiyi v. Adebiyi [1970]; Eyo v. Eyo [1972] 2 C.C.H.C.J. 121; Osibo v. Osibo [1975] 1 C.C.H.C.J. 119.

and English cases.[1] The subjective test was, however, rejected in Somorin v. Somorin,[2] where Odesanya, J., stated that 'subjective' used by Savage, J., in the above passage, 'is misleading when it is applied to the modern law of divorce in Nigeria'. The learned Judge pointed out[3] the fact that the court in Nigeria, unlike under the English Divorce Act 1969, has a discretion to dismiss a petition, even if one or more of the facts in section 15(2) of the Decree are established by evidence, under section 28 of the Decree, which provides that the Court may, in its discretion, refuse to make a decree of dissolution of marriage, if, since the marriage, the petitioner has committed adultery that has not been condoned by the respondent, or, having been so condoned, has been revived; or the habits of the petitioner have, or the conduct of the petitioner has, conduced or contributed to the existence of matters relied upon by the petitioner. The learned Judge continued:

> Under our law a petitioner who alleges and proves adultery against the respondent may find that he or she is not in the circumstances of the particular case entitled to say that he or she finds it intolerable to live with the respondent. If he is himself an adulterer ... he can only hope that the discretion of the trial judge will be exercised in his favour. In my view it is a discretion which must be exercised in order to do justice to the parties.[4]

This judicial reminder by Adesanya, J., that there are discretionary bars to a grant of divorce in the Matrimonial Causes Decree 1970, is opportune. Generally,

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1. See Goodrich v. Goodrich [1971] 1 W.L.R.1142; Pheasant v. Pheasant [1972] 1 ALL E.R.587 at 590; [1972] Fam. 202, at p. 207.

2. [1973] 10 C.C.H.C.J.103;

3. Ibid., p. 105.

4. Ibid., pp. 105-106.

the Nigerian courts, following the English decision in Goodrich v. Goodrich,[1] have been pre-occupied with the subjective nature of the test of intolerability, and have disregarded the discretionary bars provided by section 28 of the Nigerian Decree, which are absent in the English Divorce Reform Act, 1969. Because of this, there are many cases in which a husband, himself guilty of adultery, was nevertheless able to state successfully that he found it intolerable to live with the respondent wife because of her adultery. Thus, in Bakare v. Bakare and Anor,[2] the petitioner had himself committed adultery prior to the respondent's adultery on which he was, inter alia, basing his petition. It was held that, in spite of his own adultery, the petitioner might well find it intolerable to live with the respondent. In Labode v. Labode,[3] Odesanya, J., stated the reason for such decisions:

> ... social reality in Nigeria is such that husbands often find life intolerable with a wife when they themselves flourish openly in adultery. As the test is subjective the question is 'What are the present feelings of the petitioner?'

In very few of the many cases where adulterous husbands pleaded that they found it intolerable to live with a wife who had committed adultery, was any reference made to the fact that the court had the discretion to deny or grant a divorce when the petitioner had himself been guilty of adultery.[4] These decisions reflect the attitude of customary law towards a wife's adultery. In most systems of customary law, a wife's adultery was regarded as a crime, while adultery by the husband was disregarded.[5]

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1. [1971] 2 ALL E.R. 1340.

2. [1971] Suit No. HD/44/71, unreported, Lagos High Court, 20 Dec. 1971.

3. [1972] 2 C.C.R.C.J. 107; [1972] L.L.R.107, at p. 111.

4. See S. 28(a) M.C.D., 1970; and Omo-Ogunkoya v. Omo-Ogunkoya [1974] 6 C.C.H.C.J.1057, where S. 28 was considered.

5. See further, above, Chapter VII, p. 561.

(c) The connection between adultery and intolerability

Another problem which has arisen in regard to the interpretation of section 15(2)(b), is the question of a connection between the adultery and the intolerability. By section 15(2)(b), in addition to proof that the respondent has since the marriage committed adultery, the petitioner must also show that he or she finds it intolerable to live with the respondent. Must the petitioner have found life with the respondent intolerable as a result of the respondent's adultery, or is it sufficient if the petitioner found life with the respondent intolerable for independent reasons? There are a number of conflicting decisions in both the Nigerian and English courts. If the section is interpreted literally, as was done in Goodrich v. Goodrich,[1] an English case, the petitioner may rely, not only on the adultery, but on any other matter, to show that further cohabitation with the adulterous spouse would be intolerable. In Goodrich v. Goodrich[1] the Court held that, to satisfy section 1(2)(a) of the English Divorce Reform Act 1969, a provision similar to section 15(2)(b) of the Nigerian Decree, it was not necessary for a petitioner to show that he finds it intolerable to live with the respondent in consequence of the adultery. It is sufficient if the petitioner genuinely finds it intolerable to do so for whatever reason. The husband was accordingly granted a decree nisi because the wife had committed adultery (which he had condoned), and because he found it intolerable to live with her, since she had made unfounded allegations of cruelty against him and refused to be reconciled with him.

Goodrich v. Goodrich[1] has been followed in many cases in Nigeria. Thus, in Akwara v. Akwara and Anor,[2] Odesanya, J., held that the petitioner's finding it intolerable to live with the respondent could be due to reasons other than the respondent's adultery. In this case, the wife

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1. [1971] 2 ALL E.R., 1340.
2. [1971] Suit No. WD/33/71, unreported, Lagos High Court, 22 Nov., 1971.

petitioner, who had been sent by her husband for a secretarial course in the United Kingdom, returned to discover that the husband was living with the co-respondent as husband and wife. The respondent refused to allow the petitioner to live with him. After an attempted reconciliation, the respondent offered to allow the petitioner to stay in the matrimonial home, on the condition that she should share it with the co-respondent. The petitioner rejected this offer, and petitioned for dissolution of the marriage on the ground that the respondent had committed adultery, and that she found it intolerable to live with him. The court granted her petition, although it was clear that it was not the respondent's adultery as such, but his proposition that she should share the matrimonial home with the co-respondent, that made it intolerable for her to continue to live with the respondent. The Judge said:

> The first respondent has by his own act converted a monogamous marriage into a polygamous or a potentially polygamous marriage. The petitioner could not be expected to accept the arrangement proposed by her husband, that is to share the matrimonial home with the woman cited. The petitioner is therefore right to say that she finds life with her husband intolerable in the circumstances.[1]

This literal interpretation of section 15(2)(b) has been followed in a number of other Nigerian cases.

There are, however, some cases both in Nigeria and England, where a contrary interpretation of the section has been adopted. In the English case of Roper v. Roper,[2] Faulks, J., stated: 'Common sense tells you that S.(1)(2)(a) [of the English Divorce Reform Act] means and in consequence of the adultery the petitioner finds it intolerable to live with the respondent'. This decision was approved

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1. See e.g. Osibo v. Osibo [1975] 1 C.C.H.C.J.119.
2. [1972] 1 W.L.R.1314; [1972] 3 ALL E.R.668; Carr v. Carr [1974] 1 ALL E.R.1193, C.A.

in the Nigerian case of Somorin v. Somorin,[1] where it was stated that the intolerability of life with the respondent must stem from, or be a consequence of, the proved adultery.[2]

The English Court of Appeal has now determined that the petitioner need not show that he finds it intolerable to live with the respondent because of the respondent's adultery. In Cleary v. Cleary,[3] the wife had committed adultery which had been condoned. The husband later petitioned for divorce, stating that he could no longer live with his wife, because 'there was no future for the marriage at all'. His petition was dismissed by the trial court. On appeal, it was held that the two facts [viz. that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent] are independent, separate and unrelated. It was, however, held that the court must satisfy itself that the petitioner's assertion that he finds it intolerable to live with the respondent is true, and should not accept his 'bare assertion' to that effect. Roper v. Roper,[4] and similar English decisions, which adopted a non-literal translation, have thus been overruled. The Nigerian Supreme Court has not yet pronounced on the interpretation to be given to section 15(2)(b) of the Decree.

Of the two interpretations, the non-literal interpretation adopted in Roper v. Roper[4] is preferable; Cleary

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1. [1973] 10 C.C.H.C.J. 103.

2. See also Okala v. Okala [1973] 3 E.C.S.L.R.69 at p. 72; Agu v. Agu [1972] 2 E.C.S.L.R. 452; Eyo v. Eyo [1972] 2 C.C.H.C.J. 121; Ibeawuchi v. Ibeawuchi [1973] E.C.S.L.R. 56.

3. [1974] 1 ALL E.R. 498, C.A.; [1974] 1 W.L.R. 73; [1973] 117 Sol. J. 834. See also Anderson v. Anderson [1972] 117 Sol. Jo. 33.

4. [1972] 1 W.L.R.1314; [1972] 3 ALL E.R.668.

v. Cleary,[1] has been judicially criticised,[2] and may yet be overruled by the House of Lords. If the literal interpretation of the section is carried to its logical conclusion, once the respondent has committed adultery, the petitioner is entitled to a divorce on any ground which makes it intolerable for him or her to continue to live with the respondent. Such grounds need not be based on the respondent's conduct, and can include the petitioner's love for another person.[3] This seems contrary to the spirit of the Nigerian Decree which, although it liberalizes the ground for divorce, contains several provisions aimed at promoting the sanctity of marriage.[4] The fact that a petition based on section 15(2)(b) of the Decree is not subject to the two years bar, but may be brought at any time after the celebration of the marriage is a further disturbing factor.

In Oye v. Oye,[5] the counsel for the petitioner in a divorce suit, submitted that, since the adultery was committed when the parties were already living apart, it could not be said that the adultery made it intolerable for the respondent to live with the petitioner. Odumosu, J., dismissed the submission as an ingenuous argument, but not a reasonable interpretation of the law. He held that whilst husband and wife are living apart, until a petition

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1. [1974] 1 ALL E.R.498,C.A.

2. See Carr v. Carr [1974] 1 ALL E.R.1193 C.A. where a differently constituted Court of Appeal from that which decided Cleary v. Cleary, held that the construction of S. 1(2)(a) was questionable, but the Court was constrained by authority to follow Cleary v. Cleary.

3. In Cleary v. Cleary (supra), Lord Denning stated obiter: that a petitioner cannot rely on his own 'love for another woman' as leading him to find it intolerable to live with the respondent.

4. See e.g. the reconciliatory provisions of section 28.

5. [1974] 4 E.C.S.L.R. 494.

is filed, the law must presume an intention of one of the parties to live with the other. During this period there is still a hope of reconciliation. Any adultery committed during the period lessens the chances of reconciliation and so could be said to have made it intolerable for the innocent party to live with the guilty party.

(d) Damages for Adultery

Section 31(1) of the Matrimonial Causes Decree, 1970, states:

> A party to a marriage, whether husband or wife, may, in a petition for a decree of dissolution of the marriage alleging that the other party to the marriage has committed adultery with a person or including that allegation, claim damages from that person on the ground that that person has committed adultery with the other party to the marriage and, subject to this section, the court may award damages accordingly.

The Decree has therefore abolished the common law discrimination against women, whereby a husband could claim damages for his wife's adultery, but a wife had no corresponding right to claim for her husband's adultery. This fact has not been fully realised by some judges. For example, in Shokunbi v. Shokunbi,[1] W.A. Savage, J., found as a fact that the woman cited, Omolara, was guilty of committing adultery with the respondent husband. However, he refused to grant the wife's claim for damages. He said:

> I am satisfied that the respondent committed adultery with Omolara, but I am unable to award damages, for it is trite law that the woman with whom he committed adultery could not be ordered to pay damages.

It is amazing that this statement could be made in July 1976, more than six years after the Matrimonial Causes Decree, 1970, came into force. It is a glaring example of the fact that many Nigerian Judges have largely ignored

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1. [1976] 7 C.C.H.C.J.1913, at p. 1919.

the provisions of the Decree, and have continued to apply the law as it was before the enactment of the Decree.[1]

In Adenipekun v. Adenipekun and Ezekoye,[2] Odumosu, J., noted the change in the law, but expressed his disapproval of it. In considering a wife's claim for damages, against the woman cited for committing adultery with her husband, he said:

> This claim would not have been possible if it were based on the English Matrimonial law which was the law in Nigeria before the promulgation of the Matrimonial Causes Decree 1970. For the English law only provided for an action in damages by a husband against a man who had committed adultery with his wife. I would like to observe that our country has taken a retrograde step in making provision for a wife to claim damages against a woman with whom her husband has committed adultery.

The learned Judge did not state the reasons for his opinion, but it is respectfully submitted that there is no justification for his total rejection of a wife's entitlement to damages. In Adeyinka v. Godwin Ohuruogu,[3] the Nigerian Supreme Court held that 'damages against the co-respondent are not awarded to punish him; they are awarded to compensate the husband for losing the consortium of the wife...' It cannot be denied that the wife of a statutory marriage has an exclusive right to the consortium of her husband. The denial of her right to claim damages if the consortium of her husband is lost, or impaired by the adultery of the woman-cited with her husband, cannot be defended. She ought to be compensated for the loss.

The reason why compensation by way of damages

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1. See the comments of the Nigerian Supreme Court in this respect in Olu-Ibukun and Anor v. Olu-Ibukun [1974] 2 S.C. 41, and Oviasu v. Oviasu [1973] 11 S.C. 315, 329.

2. [1974] 4 E.C.S.L.R. 605; see also Anoka v. Anoka [1973] 3 E.C.S.L.R. where damages against the woman-cited were not awarded because the wife cross-petitioned for judicial separation and not for divorce.

3. [1965] 1 ALL N.L.R.210; see also Mohommed v. Mohommed [1952] 14 W.A.C.A. 199.

for adultery was denied to the wife under the common law was because of the quasi-proprietary interest which the husband had in his wife and her services at common law. The Married Women's Property Acts 1884-1892, have abolished this right. It would therefore be anomalous to confine compensation for adultery to the husband, since he now has no more proprietary interest in his wife than she has in him.[1]

Whether the time is ripe for the total abolition of the right to claim damages for adultery in Nigeria is debateable. It is pertinent to note, however, that, unlike England, where the right was abolished because claims for damages for adultery were rare,[2] in Nigeria, damages for adultery are claimed from the co-respondent, wherever possible, in most divorce suits in which adultery is alleged.[3]

The courts have laid down some criteria for the award of damages for adultery which may be briefly summarised:
(i) Where there is evidence that the marriage has broken down before the adultery damages will not be awarded.[4]
(ii) The character and conduct of the spouses, especially

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1. Parity between husband and wife in respect of damages for adultery was achieved in England by the abolition of all awards of such damages, see Law Reform(Miscellaneous Provisions) Act, 1970, Ss. 4 and 5 which implemented the recommendation of the Law Commission, No.25, Family Law, Report on Financial Provision in Matrimonial Proceedings, 1969, paras. 92-102.

2. See the reports of the Law Commission, No.25, 1969, Family Law Report on Financial Provision in Matrimonial Proceedings, paras. 99-102.

3. Out of 100 cases examined by the present writer involving alleged adultery of a wife, damages from the co-respondents were claimed in 83 cases. In many cases the damages claimed were exhorbitant, see e.g. Akapo v. Akapo [1972] 7 C.C.H.C.J.105, £2,000 claimed by plaintiff husband, £200 awarded; Arinoye v. Arinoye [1972] 3 C.C.H.C.J.146, £1000 claimed by the husband, a legal practitioner, no damages awarded; Sifo v. Sifo [1972] 1 C.C.H.C.J.52,£5,000 claimed, £100 awarded.

4. Adenipekun v. Adenipekun and Anor [1974] 4 E.C.S.L.R.605; Adeyimi v. Adeyimi [1969]2 ALL N.L.R.181; if the fact upon which the marriage is held to have broken down is not on the fact of adultery committed by the petitioner, damages cannot be awarded - Dekon v. Dekon [1976]10 C.C.H.C.J.2507. See also Evoroja v. Evoroja [1961] W.N.L.R.6; Adeyinka v. Ohuruogu [1965] 1 ALL N.L.R.210.

the respondent, are of importance in assessing the level of damages.[1]

(iii) Damages awarded for adultery may be substantial,[2] but they should not be punitive or exemplary.[3]

(iv) Damages can only be awarded on a petition for divorce.[4]

(v) A co-respondent or woman-cited will not be liable for damages if he or she had no knowledge[5] at the time the adultery was committed that the respondent was married.[6]

(vi) The Supreme Court has stated that in Nigeria a woman may be married without being married under the Marriage Act, and a man may have reasons to believe she was married, without thinking that she was married under the Act. For damages to be awarded, therefore, it must be proved that the co-respondent knew, or had reason to believe that the petitioner's wife was married under the Marriage Act.

It is submitted, with the greatest respect, that this view is unwarranted. While knowledge that the male respondent is married under the Act may be relevant in the case of the woman-cited, it is difficult to see why lack of such knowledge should relieve the male co-respondent of liability. In a non-statutory marriage, a wife is not regarded as having an exclusive right to her husband's consortium. In such marriages, however, the husband has an exclusive right to his wife's consortium. In all marriages in Nigeria, adultery by a wife is a grave matrimonial offence, and in most systems of customary law was formerly

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1. Adeyemi v. Adeyemi [1969] 2 ALL N.L.R.181; Adeyinka v. Ohuruogu [1965] 1 ALL N.L.R.210.

2. Taiwo Williams v. Williams and Anor [1972] Suit No. HD/19/71, unreported, 25 Feb., 1972.

3. Mohommed v. Mohommed [1952] 14 W.A.C.A.199.

4. Matrimonial Causes Decree 1970, S.31(1); See Aja v. Aja [1972]1 E.C.S.L.R.140; Rone-Orugboh v. Rone-Orugboh [1973] 7 C.C.H.C.J.80; Dekon v. Dekon [1976]10 C.C.H.C.J.145.

5. Arinoye v. Arinoye [1972] 3 C.C.H.C.J.146.

6. But see Adeyinka v. Ohuruogu [1965]1 ALL N.L.R.210: the co-respondent must also have known that the respondent was married under the Marriage Act.

a crime.[1] Irrespective of the type of marriage of the woman respondent, therefore, the co-respondent ought to know that he is committing a wrong, once he knows that she is married.

(vii) Where the adultery has been condoned or conduced to by the conduct of the petitioner, damages will not be awarded.[2]

(viii) No damages will be awarded for adultery committed more than three years before the presentation of the petition.[3]

(4) The respondent's behaviour.

Under section 15(2)(c) of the Decree, the petitioner may establish irretrievable breakdown of the marriage, by showing that the respondent's behaviour is such that the petitioner cannot reasonably be expected to live with him. Unlike the English Matrimonial Causes Act 1973, section 16 of the Nigerian Decree enumerates certain situations from which, once established, the court must hold that the respondent's behaviour is unreasonable.

Nwogugu asserts:

> It is relevant to point out initially that some of the situations provided in Section 16 are applicable to both the husband and wife, while others may apply only to a husband or a wife.[4]

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1. See above, Chapter VII, p. 562 ; adultery is still a crime under the Penal Code Law, Cap. 89 Laws of the Northern Region of Nigeria, 1963 Revision, Ss.387 and 388.

2. See Olutayo v. Olutayo [1970] Suit No. 1/96/69, unreported, 20 Feb. 1970: 'the real import of condonation is a conditional waiver of the right of the spouse to take matrimonial proceedings'. Cf. Ehigiator v. Ehigiator [1966] 2 ALL N.L.R.169; Harrison-Obafemi v. Harrison-Obafemi [1965] N.M.L.R.466, Williams v. Williams [1966] 1 ALL N.L.R. 36.

3. Akapo v. Akapo [1972] 7 C.C.H.C.J.105.

4. Nwogugu, Family Law in Nigeria, 1974, p.141.

This assertion is unjustified, as the Decree makes no such distinction. For example, under the Matrimonial Causes Act, 1950, it was possible for a wife petitioner to obtain a divorce on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.[1] These grounds were not available to a husband petitioner, due no doubt to the fact that such acts were usually committed by men. The Matrimonial Causes Decree, 1970, has abolished this discrimination, and the husband of a wife who has committed rape, sodomy or bestiality (any one of which may be committed by a woman)[2] is entitled to claim that her behaviour is unreasonable, and that he cannot as a result be expected to live with her.

All the types of behaviour set out in section 16 are equally applicable to a husband or wife petitioner, or respondent, although some behaviour may be more likely in the case of a husband. For example, section 16(c) of the Decree provides that if, since the marriage, the respondent has, within a period not exceeding five years, suffered frequent convictions for crime in respect of which the respondent has been sentenced in the aggregate to imprisonment for not less than three years, and habitually left the petitioner without reasonable means of support, the court must hold that such behaviour is unreasonable under section 15(2)(c). A wife is more likely to need maintenance from her husband, than a husband is to need maintenance from his wife, but there is no reason why a husband petitioner, in appropriate circumstances, should not base his petition for divorce on this sub-section. An outstanding feature of the Decree is the fact that, so far as possible, it has assimilated the position of husband and wife, and there is no distinction of liability to maintain between husband and

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1. Matrimonial Causes Act, 1950, section 1(1).

2. If a wife has aided, counselled or procured another person to commit rape, she may be guilty as a principal offender in criminal law, see Criminal Code, Cap 42, Ss.7(b), 7(c) and 7(d).

wife.[1]

The situations set out in section 16 as evidence of unreasonable behaviour are not exhaustive.[2] Other facts outside those set out in section 16(1) may be proved to establish section 15(2)(c) of the Matrimonial Causes Decree 1970. For example, cruelty is not denominated as a matrimonial offence under the provisions of the Matrimonial Causes Decree, but it comes within the ambit of section 15 (2)(c) of the Decree.[3]

The fact that the test of unreasonable behaviour is objective necessarily connotes that the respondent's behaviour must be of some degree of gravity.[4] In Akponor v. Akponor,[5] it was held that such additional facts must be of an 'equally grave nature as of those in section 16(1)'. The test whether facts outside of those set out in section 16 are sufficiently grave to make it unreasonable to expect the petitioner to endure them, and to continue to live with the respondent is an objective one, and is for the judge and not for the petitioner alone to decide. In Babalola v. Babalola[6], Savage, J., stated:

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1. See Matrimonial Causes Decree, 1970, Ss. 70 et. al.

2. See Akponor v. Akponor [1974] 6 C.C.H.C.J.,1047; Johnson v. Johnson [1972]9 C.C.H.C.J.109.

3. See Udeh v. Udeh [1970] Suit No. E/ID/70, unreported, Enugu High Court, 24 July 1970; Oladetohun v. Oladetohun [1971] Suit No. HD/111/70 unreported decision Lagos High Court.

4. In Oye v. Oye [1974] 4 E.C.S.L.R. 494, the wife's refusal to use her husband's surname, and other unproved allegations of embarassing and humiliating conduct were held to be not sufficiently grave to amount to unreasonable behaviour under S. 15(2)(c) of the Matrimonial Causes Decree, 1970.

5. [1974] 6 C.C.H.C.J. 1047.

6. [1972] 11 C.C.H.C.J. 110.

> the question is not whether the petitioner finds it intolerable to live with the respondent in the circumstances narrated by her, but whether she can reasonably be expected to live with him.[1]

The courts have held that a variety of behaviour has satisfied the requirements of section 15(2)(c) of the Matrimonial Causes Decree, 1970, e.g.

(a) unreasonable refusal of sexual intercourse, nagging, the habitual intemperate drinking of alcohol and inordinate sexual indulgence with various women, particularly housemaids, by a husband;[2]

(b) indulgence in the practice of juju and charms by the wife of a Christian Clergyman;[3]

(c) the possession of native medicine, herbs and charms or black juju, her practice of such cult to the annoyance, distress and apprehension of injury to the petitioner, by a wife;[4]

(d) the proclivity of a wife respondent to draw a knife on the petitioner whenever there was a disagreement;[5]

(e) refusal by a husband respondent to have sexual intercourse with the petitioner on the ground that it was a useless expenditure of energy on a childless woman whose infertility was no longer in doubt, referring to the petitioner as if she were a man, accusations of

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1. Ibid., 111; see also Osibo v. Osibo [1975] 1 C.C.H.C.J. 119,123; Onokpasav v. Onokpasav [1975]8 C.C.H.C.J.1237; Udoh v. Udoh [1970] N.M.L.R.33; Sogbetun v. Sogbetun [1972] 10 C.C.H.C.J. 97.

2. Johnson v. Johnson [1972] 11 C.C.H.C.J.94; see also Gbajabiamila v. Gbajabiamila [1976] 1 C.C.H.C.J.

3. See Oladetohun v. Oladetohun [1971] Suit No. HD/111/70, unreported Lagos High Court, 6 July 1971, where Adefarasin, J., held that whereas the practice of charms or juju by one spouse, even though condemned or detested by the other spouse, could not amount to a matrimonial offence under the Matrimonial Causes Acts, 1950 and 1965, which previously applied in Nigeria, and that these practices do not amount to cruelty under those Acts, but the practices can now be behaviour which a petitioner cannot reasonably be expected to live with under S.15(2)(c) of the Matrimonial Causes Decree, 1970.

4. Johnson v. Johnson [1972] 11 C.C.H.C.J. 94.

5. Akponor v. Akponor [1974] 6 C.C.H.C.J. 1047.

> insubordination, laxity and disrespect for the respondent, usually accompanied by physical attacks.[1]

On the other hand, a single act of cruelty in which the respondent husband beat the petitioner, pushed her down, and locked her up in a room was held by Oputa, J., not to amount to the sustained behaviour pattern of cruelty envisaged by section 15(2)(c).[2]

In Babalola v. Babalola,[3] the petitioner gave instances of the respondent's conduct, and complained that he often beat her without any apparent reason; that he brought her mother in law to live with them in a one-roomed apartment, and that the mother-in-law took control of the running of the matrimonial home. She added that this state of affairs became so unbearable to her that it affected her health, and she had to leave the matrimonial home for her parents' home, where she had medical treatment. Savage, J., stated as follows:

> The question is not whether the petitioner finds it intolerable to live with the respondent in the circumstances narrated by her but whether she can reasonably be expected to live with him. Merely telling the court that her husband beats her and her mother-in-law takes control of the running of the home without more seems to me insufficient. It is true that there is no express requirement for proof of injury or likelihood of injury to health under section 15(2)(c) of the Decree, it is my view that proof of such injury must always be highly relevant in determining what can be expected of the petitioner.
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> I cannot hold on the evidence that cruelty

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1. Anakwenze v. Anakwenze [1972] 2 E.C.S.L.R. 708.

2. Ibeawuchi v. Ibeawuchi [1973] 3 E.C.S.L.R.56. See also Okafor v. Okafor [1972] Suit No. O/6D/71, unreported, Onitsha High Court, 13 Nov 1972, Megafu v. Megafu, [1972] Suit No. O/7D/71, unreported, Onitsha High Court, 13 Dec. 1972.

3. [1972] 11 C.C.H.C.J. 110.

has been proved against the respondent.[1]

It is respectfully submitted that this judgment overlooks a number of points:

(a) The court seems to have disregarded the statement of the Supreme Court of Nigeria regarding proof of cruelty, laid down in Williams v. Williams.[2] In that case the petitioner complained of constant nagging by his wife which affected his health from time to time; unfounded allegations of adultery against him by the wife which so annoyed and worried him that on one such occasion he had a motor car accident; and the fact that without his consent she left him to care for the three infant children of the marriage, in order to take up a scholarship in Germany. There was no medical evidence. The trial Judge accepted the husband's evidence, but took the view that the husband had failed to prove legal cruelty, because there was no evidence to show that the wife's conduct 'had caused any danger to the husband's life, limb, or health (bodily or mental), or that a reasonable apprehension of such danger could arise from her conduct', which the judge said could only be proved by medical evidence. He dismissed the petition. On appeal, the Supreme Court held:

> Where a petitioner relies on actual injury in proof of cruelty, medical evidence, though desirable, is not indispensable; and, although no specific instance of violence is given, the court should consider whether on the entire evidence viewed objectively the respondent's conduct in its cumulative effect caused or gave rise to a reasonable apprehension of danger to the petitioner's health, bodily or mental.[3]

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1. Cf. Afolabi v. Afolabi [1975] 6 C.C.H.C.J.949, where it was held that the close association between the respondent and co-respondent stopped short of adultery, but was such conduct that the petitioner could not reasonably be expected to live with the respondent under Section 15(2)(c) M.C.D. 1970, although the conduct complained of related to incidents after the respondent left the matrimonial home.

2. [1966] 1 ALL N.L.R.36.

3. Ibid., pp. 41-42.

The Court held that the trial judge, in interpreting the term 'legal cruelty', 'took too narrow and limited a view', and that the wife's actions, when taken together, amounted to cruelty.

As noted by Savage, J.,[1] himself, the Decree provides no express requirement for proof of injury, or likelihood of injury to health. Such proof must therefore be as laid down by the Supreme Court, before its enactment. In fact it was held in Udeh v. Udeh[2] by Agbakoba, J., that the test of what constitutes intolerable behaviour under section 15(2)(c) is lower than that required for cruelty, 'for evidence which might bring the conduct of the respondent within the section might fall short of cruelty under the old test.'[3]

(b) The learned Judge, in holding that on the evidence cruelty had not been proved against the respondent, has lost sight of the fact that what the Decree requires to be proved is not cruelty, but behaviour which makes it unreasonable for the petitioner to continue to live with the respondent. A husband who allows his mother to take control of the matrimonial home, against the wishes of his wife, may not be guilty of legal cruelty; but to most modern Nigerian women, deprivation of the management of the household would constitute unreasonable behaviour, which would make it unreasonable for them to be expected to continue the marital relationship, since the wife is thereby rendered ineffectual in her own home.

(c) As previously noted, the test is objective:[4] can this petitioner reasonably be expected to live with this respondent?

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1. Babalola v. Babalola [1972] 11 C.C.H.C.J. 110 at p. 111; see further, above, p. 285.

2. [1970] Suit No. E/ID/70 unreported decision of Enugu High Court, 24 July 1970.

3. See section 82 of the Decree which provides that a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the court.

4. Cf. this with the test in section 15(2)(b) which the courts have held should be subjective, see above, pp.271-274.

In the words of Olatawura, J.,

> was the conduct of such grave and weighty nature as to make cohabitation virtually impossible? In assessing the gravity of the conduct the court must consider the particular parties to the suit before it, and not 'ordinary reasonable spouses'.
>
> ... can this petitioner, with his or her character and personality, with his or her faults and other attributes, good and bad, and having regard to his or her behaviour during the marriage, reasonably be expected to live with this respondent?[1]

The wife in Babalola v. Babalola,[2] had lived in England, where a wife generally controls the domestic affairs, for a number of years. She must have imbibed the custom of the people to some extent, was educated, and working as a secretary at a fairly reasonable salary. Can she reasonably be expected to live with a husband who beat her often for no apparent reason, and forced her to share a one-room apartment with his mother who controlled the domestic affairs, although he was an engineer and earning a good salary and she herself was a wage-earner? The answer is certainly no, although it may not be so, if she had been an uneducated village girl whose husband could not afford to rent more suitable accommodation.

It has been stated that the fact 'that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with him[3] is in very

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1. Ash v. Ash [1972] Fam. 135; [1972] 1 ALL E.R.582; [1972] 2 W.L.R.347; see also Oladetohun v. Oladetohun (supra) Pheasant v. Pheasant [1972] 2 W.L.R.353; [1972] 1 ALL E.R. 587; [1972] Family Law, 202; Carew-Hunt v. Carew Hunt [1972] Times, 28 June 1972, where it was stated: 'The court was not solely concerned with the state of relationship between the parties and no longer, except marginally, passed judgment on whether a person's behaviour was right or wrong, good or bad. The court had to consider the marriage relationship and the impact of the respondent's behaviour on that relationship" (per Ormrod, J.).

2. [1972] 11 C.C.H.C.J. 110.

3. Section 1(2)(b) of the English Matrimonial Causes Act, 1973; S. 15(2)(c) of the Matrimonial Causes Decree, 1970.

simple language which is quite easy for a layman to understand'.[1] Nevertheless, its interpretation by some Courts[2] may cause results adverse to the policy of the new matrimonial law - which is to enable the empty legal shell of marriage "to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation". This policy can only be meaningful by the avoidance of hostile litigation which, under the old doctrine of matrimonial offence, led to unnecessary bitterness, and frequently had harmful effects on the children, who may love both parents. The interpretation of the section seems to preserve the concept of breach of marital obligation with its corollary of guilt and innocence. One of the main aims of the Decree - the discouragement of protracted litigation - is thereby frustrated, and incompatibility of temperament of the spouses, in many cases the main cause of marital breakdown, is excluded.

(5) Living apart

Two of the most novel aspects of the Matrimonial Causes Decree 1970 are to be found in sections 15(2)(f) and 15(2)(g). The first subsection provides that a court shall hold a marriage to have broken down irretrievably where the parties to a marriage have lived apart for a continuous

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1. See Per Dunn, J., Livingstone-Stallard v. Livingstone-Stallard [1974] Fam. 47 at p. 54, the learned Judge was critical of Ormrod, J.'s test in Pheasant v. Pheasant [1972] 2 W.L.R.353, and expressed the opinion that the test formerly used in relation to constructive desertion under the pre-1969 law, and analyses of gravity of conduct were unhelpful when construing S.1(2)(b) M.C.D.1973. See also O'Neill v. O'Neill [1975] 3 ALL E.R.289,C.A. where the trial court held that the spouses had taken each other for better or worse. On appeal, it was held that the facts had to be judged not by the language of the prayer book, but by the language of the statute - One of the wife's complaints was that the husband failed to keep himself clean... She said he hardly ever bathed himself; the husband said he bathed once a week. The Judge made a specific finding that the husband was a reasonably clean man.

2. The Nigerian Courts have mainly followed the line of reasoning in Ash v. Ash [1972]2 W.L.R.347 and Pheasant v. Pheasant (supra) see Irinoye v. Irinoye [1972]3 C.C.H.C.J.145.

period of at least two years immediately preceding the presentation of the petition, and the respondent does not object to a decree being granted; the latter simply requires that the parties have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition.

The provisions are mandatory,[1] and do not involve guilt in either party to the marriage,[2] as do the other 'factual situations' previously discussed. In effect, therefore, the provisions permit divorce by mutual consent of the spouses,[3] and the unilateral divorce of an innocent spouse by repudiation.[4] These two provisions are the only ones which really justify the claim that the sole criterion for a divorce is irretrievable breakdown of the marriage.[5] They accord with the rationale of divorce under Customary law, in which irretrievable breakdown of a marriage may be evidenced by the spouses' mutual consent to a divorce, or by the unilateral repudiation of a blameless spouse. How have the Nigerian courts interpreted these provisions?

The Nigerian courts have stressed the absence of any requirement of matrimonial fault under the two provisions. In Akioye v. Akioye[6] it was held that the respondent must be

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1. Tagbo v. Tagbo [1972] Suit No. O/ID/71.

2. See Ogunyemi v. Ogunyemi [1974] 11 C.C.H.C.J.1761; Omo-Gunkoya v. Omo-Gunkoya [1974]5 C.C.H.C.J.1057; Efanga v. Efanga [1973]10 C.C.H.C.J.117; Majekodunmi v. Majekoddunmi [1974]6 C.C.H.C.J.809; Tagbo v. Tagbo [1972] Suit No. O/ID/71, unreported, Onitsha High Court; guilt may be relevant where the respondent or petitioner asks for maintenance, see Dekon v. Dekon [1976] 10 C.C.H.C.J.2507 at 2517.

3. S.15(2)(e), M.C.D. 1970.

4. Ibid., 15(2)(f).

5. In Pheasant v. Pheasant [1972] Ormrod J., stated that separation is 'undoubtedly the best evidence of breakdown, and the passing of time, the most reliable indication that it is irretrievable'; see also Adekunle v. Adekunle [1974] 5 C.C.H.C.J.1057.

6. [1973] Suit No. CAW/90/71, unreported decision of the Western State Court of Appeal, 26 January 1973; see also Ogala v. Ogala [1973] 12 C.C.H.C.J.89, where it was held that it is wrong for the court to hold a post mortem on the cause of the parties living apart even when deciding issues relating to ancilliary relief; Johnson v. Johnson [1972] 9 C.C.H.C.J.109.

shown to be the cause of the break-up of the marriage by his or her own conduct. The trial court noted that if this view was not accepted,

> a petitioner who packs out of the matrimonial home because she becomes pregnant for another man can ask for the dissolution of her marriage after living apart from her lawful husband for a period of over two years in cases which come under sub-section (e) if the husband does not object or for three years in cases which come under the ground in sub-section (f), whether the husband objects or not.

The court held that the petitioner ought not to benefit from her own wrong.[1] This decision was reversed by the Western State Court of Appeal, on the ground that the subsection (e) confers no discretion on the courts, and that, unlike desertion, which rests on the principle of matrimonial fault alleged by the petitioner against the respondent, the section provides for divorce as of right, once the constituent elements of (1) living apart (2) for two years, and (3) the respondent does not object to a decree being granted, are established. Even though the living apart was due to the respondent's wrongful conduct, she could not be rightly denied a divorce.[2]

Does 'living apart' involve both (a) a physical and (b) a mental element?

(a) Physical separation

The Decree provides that the parties to a marriage shall be treated as living apart unless they are living with each other in the same household. Some courts have interpreted this provision literally, and have held that mere

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1. See the eloquent appeal to the House of Lords by the [nonagenarian] former Lord Chancellor, Lord Simmons, that the House should follow 'the pattern of justice, decency, and honour, and refuse to the man who comes before you the benefit of his own wrong' Hansard (H.L.) Vol.303, col.1300.

2. See also Majekodunmi v. Majekodunmi [1974]6 C.C.H.C.J.809; Tagbo v. Tagbo [1971] Suit No. O/ID/71 unreported decision of Onitsha High Court, 10 Nov. 1971.

physical separation of the spouses is enough to constitute living apart. The reason which may have caused the initial separation is disregarded. Thus, in Wachuku v. Wachuku,[1] Aguda, J. (as he then was), held that 'the reasons for the parties living apart from each other is irrelevant and does not come into consideration once they live apart from each other for at least a continuous period of three years.'[1] The facts of the case showed that the parties had established professional practices in different parts of the country. The husband practised law in Aba, while the wife was a medical practitioner in Ibadan. The husband visited the wife occasionally, and as a result, the wife had twin children, one of whom died. The husband ceased his visits in December 1965, possibly due to the fact that in January 1966 there was a military coup in Nigeria, followed by a civil war, which ended only in January 1970. The petition was presented in May 1970. The Judge held that the 'living-apart' provision had been satisfied in the circumstances, and that unless the parties are physically living in the same household, the Court must find that the parties are living apart from each other.[2]

(b) Intention

Most Nigerian cases, following decisions in other Commonwealth countries, have held that mere physical separation does not constitute living apart. In addition, there must be a severance of the marital relationship - a manifestation by one of the parties of the intention to destroy the matrimonial consortium. In Osho v. Osho,[3] the husband,

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1. [1970] Suit No. 1/108/70, unreported, Ibadan High Court, 30 July 1970.

2. See also Majekodunmi v. Majekodunmi [1974] 6 C.C.H.C.J. 809.

3. [1974] 6 C.C.H.C.J. 829.

with the wife's consent, left Nigeria in 1968 for further studies in England. The wife joined him there for one and a half months' holiday in 1968. In her petition for divorce, the wife alleged that their living apart commenced in 1968 when the husband left Nigeria. Odesanya, J., held that there was no evidence that any event occurred in 1968, before or after the wife left England, which in any way affected their consortium. He said:

> This type of consensual living apart is certainly not within the living apart in either section 15(2)(e) or section 15(2)(f) of the Matrimonial Causes Decree. It is not the living apart which can evidence the irretrievable breakdown of a marriage.
>
> It is true that for the purpose of either section the parties to a marriage are treated as living apart unless the living apart has a definitely unfavourable impact upon the matrimonial relationship.[1]

The Court held that the parties' cohabitation came to an end only in 1971, when their physical separation became hostile, and the petitioner instructed her lawyer to write to her husband about their divorce.

In the English case of Santos v. Santos,[2] the Court of Appeal has held that 'living apart' only commences when one party recognizes that the marriage is at an end; until then the spouses are, in common parlance, 'separated' rather than 'living apart', by force of circumstances. Until that date the spouses are not 'living apart', although they may 'be apart'. However, it is not necessary for the one spouse's decision to live apart to be communicated to the other, and time begins to run automatically.[3]

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1. Ibid., p. 830.

2. [1972] 2 ALL E.R.246,C.A.; [1972] Fam. 247.

3. See also Akioye v. Akioye [1973] 1 W.S.C.A.51; a petitioner has to prove not only the factum of separation but also that he or she has ceased to recognise the marriage as subsisting, and intended never to return to the other spouse.

There were several reasons for this decision:
(a) There is a stream of authority on analogous Australian, New Zealand, Canadian, and United States provisions, running uniformly and clearly in favour of regarding mere physical separation as not constituting 'living apart'. Both a physical separation and a mental attitude on the part of one or both of the spouses are necessary. Provided that both spouses recognize the marriage as still subsisting, the marital relationship does not end.
(b) It was also stated that if mere physical separation was required, absurdity[1] would result when such definition of 'living apart' is applied in conjunction with the section requiring periods of living together up to six months in all to be disregarded in calculating the period of separation, and whether it has been continuous.[2]
(c) Another reason was that the policy of the Act is to assist in the maintenance of marriages other than those reduced to a mere shell. Divorce by consent simpliciter is not permitted. Hence, it is necessary for most separation cases to receive careful judicial scrutiny, so as to ensure that the stringent test of breakdown has been satisfied.[3]

Many Nigerian decisions have adopted the view taken in Santos v. Santos[4] that there must be an end to

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1. See the comments of Sachs, L.J., in Souza v. Souza (supra) 'Thus ... a man who came home on leave for less than 20 percent of the two to two-and-a-half years immediately preceding the filing of the petition would be in a position to satisfy the court under head (d), even though he and his wife had been on excellent terms until they had a row on the last day of his last leave ... Unless - contrary to our view - the Act intended to permit divorce by consent simpliciter such a result would be absurd'.

2. S.2(5) Matrimonial Causes Act, 1973, and S.17(2) Matrimonial Causes Decree, 1970.

3. Per Sachs, L.J., in Santos v. Santos [1972]2 ALL E.R.246, C.A.; see also per Ormrod, J., in Pheasant v. Pheasant [1972]1 ALL E.R.587, 589.

4. [1972]2 ALL E.R.246,C.A.

consortium before the 'living apart' provision becomes operational.[1] It is respectfully submitted that this view is unfortunate.

(i) The Australian and New Zealand decisions, held to be 'very persuasive' in Santos v. Santos,[2] involve the interpretation of a similar but not identical provision to the 'living apart' provisions in the English and Nigerian law. For example, the Australian Matrimonial Causes Act 1959,[3] provided that 'the parties must have separated and thereafter must have lived separately and apart' and 'there is no reasonable likelihood of cohabitation being resumed'.[4] In the Australian Act, therefore, the parties must have (1) separated, (2) lived separately and apart, and (3) there must have been no likelihood of future resumption of cohabitation. Two of these requirements, (1) and (3) involve a mental element, while (2) does not. In the Nigerian Decree, and in the English Act, there is no mental element. The Decree states quite unequivocally that 'the parties to a marriage shall be treated as living apart unless they are living with each other in the same household'.

(ii) Many of the cases relied on by the Court in Santos v. Santos,[2] and by some Nigerian cases, were decided long

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1. See e.g. Ogunyemi v. Ogunyemi [1974]11 C.C.H.C.J.1761; Akioye v. Akioye [1973] Suit No. CAW/90/71 of the Western Court of Appeal; Agu v. Agu [1972]2 E.C.S.L.R.452; Ogunleye v. Ogunleye [1975]9 C.C.H.C.J.1369; Famubode v. Famubode [1977] Suit No. ID/204 W.D./76 of 24 Jan. 1977.

2. [1972] 2 ALL E.R.246 C.A.

3. Section 28(m) Matrimonial Causes Act, 1959.

4. Cf. the provision of the Australian Family Law Act, 1975, S.48(2): 'a decree of dissolution of the marriage shall be made if, and only if, the court is satisfied that the parties separated and thereafter lived separately and apart for a continuous period of not less than twelve months immediately preceding the date of the filing of the application for dissolution of marriage'.

before the introduction of the divorce reforms in England or Nigeria, when the sanctity of marriage received greater consideration than it now does. The spirit and policy of the new law may therefore be absent from many of these decisions.

(iii) The policy of the new divorce law is to assist in the maintenance of viable marriages, and not mere empty, sham unions. The Decree sets out simple, clear-cut evidential guides which should not be complicated by unnecessary investigation into the mental state of the parties.[1] A factual separation gives an easily identifiable guide which is justified, when it is borne in mind that the Decree provides several provisions aimed at a reconciliation of the spouses before a divorce is granted.[2]

(iv) The English Court of Appeal in Santos v. Santos[3] decided that an uncommunicated intention to terminate the marriage suffices to satisfy the 'living apart' provisions. This interpretation affords the petitioner an opportunity to say he had formed such an intention at an earlier stage than he had in fact done, unless there is evidence which negatives such an assertion. For example, if he had written loving letters to the respondent which showed a contrary intention. In the absence of such evidence, it is difficult for the court to ascertain precisely when the intention to terminate the marriage was actually formed.

(c) Where the parties live in the same house.

Where the parties live in the same house, can they

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1. In Ogunde v. Fadayiro [1972] 8/9 S.C. at p.15, the Supreme Court of Nigeria stated that 'A court of law must refuse to be let into construing a legislation clear in its own words and language by reference to extraneous matters of inference or supposed tendencies ...'; see also Mobil Oil (Nigeria) Ltd. v. Federal Board of Inland Revenue [1977] 3 S.C.53 - ' the general rule for construing a statute is that where the words of a statute are clear the court shall give effect to their literal meaning'.
2. In addition, in the Nigerian social context, the families of the spouses would have made efforts to reunite the parties, if reconciliation was possible or advisable.
3. [1972] 2 ALL E.R.246 C.A.

be regarded as living apart? This point received judicial attention in v. Abisuga[1]. The parties were married in London in 1965, and the marriage had never been a happy one. The husband gave a list of cruelties perpetrated by the wife which must certainly earn her a place in the honours list of husband batterers. Her acts of cruelty allegedly included 'slapping him in the face on several occasions', spitting on him more than twenty times during a seven-year period, inflicting several human bites on his person, and calling his parents wicked old devils. In 1967 when the respondent was pregnent, she became so angry with the petitioner that she told him the baby she was expecting was not his child and called him 'a useless irresponsible, senseless, bastard, a nincompoop stinking idiot'.

Because of these and other numerous acts of cruelty, the petitioner claimed there was a decline in his health, and a doctor had to prescribe tablets for his nerves. Consequently, he stated that he could no longer continue to live with the respondent as his wife.

The respondent stated that at the time the petition was filed, they both lived together under the same roof. The petitioner claimed that since 1971, he had had no sexual intercourse with the respondent, who resided and worked in Ibadan, but came to the matrimonial home in Lagos at the weekends. At such times, she merely cooked for the children, while the petitioner's cook prepared his meals. The parties did not sleep together, and continued to have violent quarrels.

The respondent's counsel submitted that, the petitioner knew that the respondent was quick-tempered, therefore/ the maxim volenti non fit injuria applied; and that since the parties have at all times been living together, the facts relied upon by the petitioner should be disregarded under section 17(1) of the Decree. This subsection reads:

> Where the petitioner alleges that the respondent behaved in such a way that the

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1. [1974] 6 C.C.H.C.J. 819.

> petitioner cannot reasonably be expected to live with him but the parties to the marriage have lived with each other for a period or periods after the date of the occurrence of the final incident relied on by the petitioner and held by the Court to support his allegation, that fact shall be disregarded in determining for the purposes of section 15(2)(c) of this Decree whether the petitioner cannot reasonably be expected to live with the respondent if the length of that period or of those periods together was six months or less.

In reply, counsel for the petitioner submitted that there had been no cohabitation, although the parties had been living under the same roof.

George, J., rejected the submission of volenti non fit injuria. Although he believed the evidence of the petitioner, and found that the respondent was an overbearing and domineering woman, he held that the words used in the Decree is 'living together' and not 'cohabitation'. As a result he refused to pronounce a decree. He said:

> I cannot pronounce a decree because of the reconciliatory provision of section 17(1) of the Matrimonial Causes Decree. This case brings to the limelight the weakness of the Decree which makes no provision for dissolution of marriages on the ground of cruelty simpliciter. What about the expected provision for dissolution of marriages on the ground of incompatibility of temperaments? The Decree is silent on this. Are we to say to incompatibles 'go and live apart for a period of three years, and come over here for judgment thereafter?'[1]

A number of interesting points arise from this judgment.

(i) The Decree does not expressly state what the position is to be if the parties have lived together for more than six months. Is the petitioner precluded from relying on section 15(2)(c); or must he merely justify his continuing to live with the petitioner in excess of the stipulated periods? George, J.,'s, decision took the view that the petitioner is precluded from relying on section 15(2)(c), but this is by no means conclusive. In the English case of

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1. Abisuga v. Abisuga [1974]6 C.C.H.C.J.819.

Bradley v. Bradley,[1] W, petitioned for divorce under S.1(2)(b) of the English Matrimonial Causes Act 1973 (which is identical with section 15(2)(c) of the Nigerian Decree). The parties had nine children (seven living with them). W. had two separation orders against H. for persistent cruelty, but she remained in the matrimonial home (a council house). She had no alternative but to sleep in his bed, and cook his meals. She even had sexual intercourse once, because she was frightened of what might happen if she did not submit. Her petition was dismissed. On appeal, it was held that the mere fact that W was living with H did not prevent her relying on section 1(2)(b). It was stated that, it was 'not reasonable to expect her to live there, but albeit unreasonable, she has no option but to be there'.[2] Megan, L.J., stated that section 2(3) [an identical section to 17(1) of the Nigerian Decree], 'does not have the effect that, if W has continued to reside in the same household with H for a period of more than six months after the last act relied on by her as showing that H's behaviour was such that she could not reasonably be expected to live with him, that necessarily produces the result that she must fail in her petition under S.1(2)(b)'.[3] The circumstances may justify her continuing to stay.

(ii) Of greater interest is the fact that George, J., found that the parties 'were living with each other in the same household', when the wife came home only at weekends, performed no matrimonial services whatever for the husband, and most aspects of consortium had ceased.

The learned Judge said:

> In reply the counsel for the petitioner submitted that there had been no cohabitation although the parties had been living under the same roof. In any case he submitted that the Respondent did not allege that they had been living together for six months.

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1. [1973] 3 ALL E.R.750.

2. Ibid., p. 752, per Lord Denning, M.R.

3. Ibid., p. 753.

> A short answer to this is that in paragraph 5 of the Answer the Respondent pleaded that she and the Petitioner lived together under the same roof up to the time of filing the petition. Counsel laid great stress on the word 'cohabitation' but the word used by the Decree is 'living together'.

With respect, it is submitted that the words used in the Decree are 'living with each other in the same household' and not 'living together' as stated by George, J. As a result of this mistake, the learned Judge did not adequately consider whether the spouses were 'living apart' within the meaning of section 15(3).

The Decree provides; 'a husband and wife shall be treated as living apart unless they are living with each other in the same household'. In the interpretation of this provision, many cases[1] have adopted the same test as was ultimately accepted for the factum of desertion under the old law. Hence, husband and wife are usually regarded as living apart, even when they are living under the same roof, unless that living is in the same household.[2] 'Household' has an abstract meaning and 'essentially refers to people held together by a particular kind of tie'.[3] In cases where the spouses continue to live under the same roof, the practical test applied is usually whether one party continues to provide matrimonial services for the other, and whether there is a sharing of domestic life. Hence they will not be 'living apart' if they share their meals and living accommodation, even though they sleep in separate rooms, no longer have sexual intercourse and largely live their own lives.[4] Where, however, the parties had no contact with one another, although they continued to live at close quarters in a

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1. See e.g. Santos v. Santos (supra), Mouncer v. Mouncer [1972] 1 W.L.R.321, 323.

2. See Mouncer v. Mouncer [1972] 1 W.L.R.321, [1972]1 ALL

3. Santos v. Santos (supra).

4. Mouncer v. Mouncer [1972] 1 W.L.R.321.

council house with two bedrooms; had not spoken to one another; had no meals together; and the wife had performed no duties for the husband, although he had continued to contribute to her maintenance. Wrangham J. held that the parties were not living with each other in the same household.[1]

In Fuller v. Fuller,[2] Stamp, L.J., stated that living with each other connotes '... something more than living in the same household - indeed the words 'with each other would otherwise be redundant"'.[3] It is respectfully submitted that the spouses in Abisuga v. Abisuga[4] were living in the same house but not in the same 'household' nor 'with each other'.

(d) Living Apart for Two Years

If the living apart is for two years it must be shown that the respondent does not object to a decree of dissolution being granted to the petitioner.[5]

In Famoriyo v. Famoriyo[6], the husband left for Britain three days after the celebration of the marriage. The marriage was not consummated, and the agreement was that the wife would join him in Britain in three months time. A year later, he suggested that the wife should join him, not as his wife, but as the wife of his brother, and stated in a letter:

> If they need marriage evidence tell brother Akin or Mr. Ogunoye anyone can make a marriage affidavit in a Magistrate Court...

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1. Hollens v. Hollens [1971] 115 Sol. Jo. 327; Hopes v. Hopes [1948] 2 ALL E.R. 920.
2. [1973] 2 ALL E.R.650.
3. Cf. Oduneye v. Oduneye [1976] 2 C.C.H.C.J.439, where Agoro, J. held that the relationship of husband and wife existed even though the parties never lived together under one roof in any matrimonial home. This decision is in accordance with the social reality of Yoruba marital life where the spouses very often live apart from each other; see also Abioye v. Abioye [1972] 4 C.C.H.C.J.89.
4. [1974] 6 C.C.H.C.J. 819.
5. Section 15(2)(e) M.C.D.1970.
6. [1975] 2 C.C.H.C.J. 253.

The wife refused to comply with this illegal suggestion, and sued for divorce on the ground of two years separation. The respondent was served with the petition, and he filed an acknowledgement of service, but did not file an answer. Adefarasin, J., held that the mere fact that the respondent did not contest the petition is not proof that he did not object. He said:

> Learned Counsel for the Petitioner argued that the mere fact that he does not contest the petition should mean that he consents to the order being made.
>
> I do not agree with that. It is desirable that a party seeking dissolution under section 15(2)(e) of the Matrimonial Causes Decree, should adduce some evidence of the consent of the respondent to a decree of dissolution being made unless the respondent by his or her answer to the petition should make a statement to that effect or he attends the trial and say so. The consent of the respondent should not be presumed.[1]

Similarly, Nwogugu writes:[2]

> A problem may arise where the respondent whose consent to a divorce is necessary suffers from mental illness ... Whether a valid consent is granted in such a situation depends on whether the respondent had the capacity to understand the nature of the consent and to appreciate the effect and result of giving it. The same test, therefore applies here as in determining whether an insane person has consented to a valid marriage ...
>
> It is respectfully submitted that the learned Judge and writer are mistaken in their view that the respondent must consent to a decree of dissolution being made. Unlike the English Matrimonial Causes Act, 1973, which states:
>
> and the respondent consents to a decree being granted,[3]

the requirement in the Nigerian Matrimonial Causes Decree is:

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1. Ibid.
2. Nwogugu, Family Law in Nigeria, op. cit., p. 161.
3. Section 1(2)(d), Matrimonial Causes Act, 1973.

> and the respondent does not object to a decree being granted.[1]

There is an essential difference in the two provisions: 'does not object' is not the same as 'consents'. Consent involves the will, or the feelings, and indicates compliance with what is requested. Consent can only be evidenced by a positive action, and therefore can never be validly assumed. 'Does not object' on the other hand, has two aspects, a positive and a negative. Non-objection may be expressed by a positive action, for example vocal or other outward evidence of non-opposition, but it may also be evidenced by a negative action when a positive action is required. 'Does not object' can therefore be presumed from a negative action. The original draft of the English Matrimonial Causes Bill, 1973, simply required that the respondent should 'not object'.[2] The requirement was amended, however, before enactment, in order to provide greater safeguards for respondents, in that they must take some positive step before the marriage could be dissolved under this subsection.

It is submitted that, once the Nigerian respondent is served with the petition, it must be presumed that he does not object, if he fails to enter an appearance or to register his objection in any other positive manner to a decree being granted. His consent is not required. The English respondent, on the other hand, must give his consent. His failure to enter an appearance cannot be taken as evidence that he has consented.

In Oghenevbede v. Oghenevbede,[3] where the respondent, in answer to the question, 'Do you intend to defend this case?' answered, 'no', it was held that her reply showed

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1. Section 15(2)(e) M.C.D.1970.

2. 'What I cannot help knowing was originally in the Bill', per Sir George Baker, P., in McGill v. Robson [1972] 1 W.L.R. 237 at 238.

3. [1973] 3 U.L.L.R. 104.

clearly that she did not object to the decree of dissolution being granted. In Ibeawuchi v. Ibeawuchi,[1] Oputa J., held, however, that a petitioner relying on section 15(2)(e) of the Decree must, in order to succeed 'endeavour to secure a more positive proof of the fact that the respondent does not object to a decree being granted. The learned Judge said:

> ... under section 15(2)(e) two things will have to be established (i) the living apart and (ii) the consent of the respondent to the divorce showing that he does not object to a decree being granted. When the law requires consent it should be shown to be a true voluntary consent. In this case there is a complete lack of evidence about the consent of the respondent. Learned counsel for the petitioner did urge during his final address that the mere fact that the respondent is not contesting this petition should be taken as evidence (of consent) that he does not object to a decree being granted. I am not prepared to go that far. There may be so many reasons why a respondent may decide not to contest a petition, reasons not having anything to do with his objecting or not objecting to a decree being granted. It is my view that those relying on section 15(2)(e) will, to succeed, endeavour to secure a more positive proof of the fact that 'the respondent does not object to a decree being granted'. I am not satisfied that mere inactivity on the part of a respondent offers that proof. I cannot grant this petition on ground three which also fails.[2]

Because of the difference between the wording of the English Matrimonial Causes Act and the Nigerian Causes Decree in certain respects, English precedents, if followed in Nigeria indiscriminately, may result in injustice. Fortunately, in this particular respect, the majority of Nigerian decisions favour the view that no positive action is necessary to provide evidence that a respondent does not

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1. [1973] 3 E.C.S.L.R. 56.

2. Ibid., p. 60.

object to a decree being granted: courts have usually held that failure to file an answer or to defend the suit indicates non-objection by the respondent.[1]

The effect of a cross-petition by the respondent has also been considered by the courts. Generally, it has been held that a cross-petition by the respondent cannot be taken as an indication that the respondent does not object to the decree being granted. It is submitted, however, that a cross-petition by the respondent, may be taken as evidence that he does object to a decree being granted to the petitioner, although he does not object to a dissolution of the marriage.

(6) Desertion

The Decree provides a number of other facts on which a court may hold that a marriage has broken down irretrievably. Thus the petitioner may be entitled to a divorce where the respondent has deserted the petitioner for a continuous[1] period of at least one year immediately preceding the presentation of the petition.[2] Desertion may be actual or constructive.[3] Thus in Ogunde v. Ogunde[4] the respondent took the petitioner back to her mother's home, and left her personal belongings outside the matrimonial home with a short letter which read:

> Please your loads are ready for dispatch to your house. You may send someone to collect them. Safety is guaranteed until

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1. S. 17(2) of the Matrimonial Causes Decree provides that in considering for the purpose of section 15(2) of the Decree, whether the period for which the respondent has deserted the petitioner or the period for which the parties have lived apart has been continuous, 'no account shall be taken of any one period (not exceeding six months) or of any two or more periods, (not exceeding six months in all) during which the parties resumed living with each other, but no period during which the parties lived with each other shall count as part of the period of desertion or of the period for which the parties to the marriage lived apart, as the case may be'.

2. Matrimonial Causes Decree, 1970, section 15(2)(d).

3. See Johnson v. Johnson [1972] 11 C.C.H.C.J.94.

4. [1973] 10 C.C.H.C.J.113; Segun v. Segun [1075] 6 C.C.H.C.J.773

7 p.m., 18th December 1970.

It was held that there could be no clearer case of constructive desertion, by the respondent.[1]

Desertion was a ground for divorce under the pre-1970 matrimonial law and, unlike the 'living-apart' provisions of the Decree, it involves the matrimonial offence doctrine.[2]

(7) Presumption of death

A marriage is held to have irretrievably broken down if the petitioner proves that the respondent has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead. The fact may be established by proof of seven years continuous absence of the respondent from the petitioner, and of the fact that the petitioner has no reason to believe that the respondent was alive at any time within that period, unless it is shown that the respondent was alive at some time within that period.[3] A decree absolute under this procedure effectively terminates the marriage even if the other party is still alive.[4] In Nnoli v. Nnoli,[5] the petitioner stated in 1974 that his

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1. See also Slon v. Slon [1969] 1 ALL E.R.759, C.A., where it was held that unreasonable refusal of sexual intercourse is a grave and weighty matter which can amount to constructive desertion if it drives the other spouse out of the home. Cf. Weatherley v. Weatherley [1947] 1 ALL E.R.563(H.L.) mere refusal of sexual intercourse while cohabitation continued could not constitute desertion; and Oseni v. Oseni [1972] 12 C.C.H.C.J.110, 117, where the husband suggested that his field work had been affected by his wife's refusal of sex, Dosunmu J. held that it should rather 'strengthen him in his spiritual devotion'.

2. See Odilli v. Odilli and Anor [1973] 3 E.C.S.L.R.62.

3. The English Matrimonial Causes Act, 1973, S.19(3) states that the period must be 'seven years or more'.

4. Nnoli v. Nnoli [1974] Suit No. 0/5D/74 unreported, Onitsha High Court, 13 December 1974.

5. [1974] Suit No. 0/5D/74 (supra).

wife left him on 6 January 1955, and that he had not heard from her again. His efforts to trace her had all failed. Her father, too, had not heard from her. The Onitsha High Court held that she must be presumed dead, but stated that even if she was alive the marriage had irretrievably broken down. An order for a decree nisi was pronounced.

It is submitted that if, before the decree nisi was made absolute, the wife had appeared, the decree nisi should have been rescinded, as the Decree specifically provides that the court cannot hold that the marriage has broken down irretrievably, if it is shown that the other party to the marriage was alive at a time within the period of seven years immediately preceding the date of the petition.[1]

In view of the fact that a divorce may be obtained under the Decree after three years factual separation, the importance of this provision is considerably less than the similar provision in the old law.[2]

(H) Two years delay

No petition for divorce may be presented within two years of the date of the marriage, unless application is first made to a judge, who may permit the petition to be brought on the ground that refusal would impose exceptional hardship on the applicant, or that the case is one which shows exceptional depravity on the part of the proposed respondent.[3]

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1. See also Gallacher v. Gallacher [1964] The Times, 9 June, 1964; Manser v. Manser [1940] 4 ALL E.R.238; [1940]P.224, cases decided under the old law - a decree nisi would be rescinded if the other spouse is still alive.

2. See Deacock v. Deacock [1958] P.230, C.A. See also Section 14(1) of the Matrimonial Causes Act, 1965.

3. Section 30 M.C.D. 1970.

Petitions based on the respondent's wilful and persistent refusal to consummate the marriage, his adultery, or the fact that since the marriage the respondent has committed rape, sodomy, or bestiality are excepted, and may therefore be brought before the expiration of two years without special leave.[1]

These exceptions represent a change from the old law, which is important, because many of the cases which were brought under this provision in the old law would have needed no permission under the Matrimonial Causes Decree, 1970, as the allegations in most cases included adultery,

What constitutes exceptional hardship or depravity is a question of fact. The courts have generally refused to lay down general rules to fetter the exercise of their discretion, since the aim of the provision is to promote the preservation of the marriage. The stress is therefore on exceptional depravity or hardship. In the cases decided before 1970, it was held that where there is nothing more than adultery with one person within the first three (now reduced to two) years of marriage, such adultery may be considered only as ordinary depravity. Where, however, the adultery was coupled with other matrimonial offences, which by themselves could not amount to exceptional depravity on the part of the respondent, it could nevertheless amount to exceptional hardship imposed on the applicant. In Majekodunmi v. Majekodunmi,[2] Taylor, C.J., held that lack of maintenance for the applicant and the only child of the marriage, refusal by the husband to live with the applicant under the same roof, coupled with his adultery resulting in the birth of a child by another woman, did not show exceptional depravity on the part of the proposed respondent, but they nevertheless showed exceptional hard-

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1. Section 30(2) M.C.D.1970.

2. [1966] 2 ALL N.L.R.28.

ship suffered by the applicant.[1]

In Akere v. Akere,[2] the applicant alleged adultery coupled with cruelty. The acts of alleged cruelty included inordinate sexual demands, made even when the applicant was in poor health and had just returned from hospital; physical violence, constant neglect and quarrelling. The proposed respondent had also infected the applicant with venereal disease, and had, in effect, turned her out of his home. He had committed adultery with three other women, which had resulted in the birth of a child to one of the women. Duffus, J., held that the allegations, if proved, would amount to exceptional hardship and depravity.

Two important considerations in exercising the discretion are whether reconciliation between the parties is unlikely before the expiration of the two year period, and the interest of any children of the marriage.[3]

The view is expressed that this provision constitutes 'a useful safeguard against irresponsible or trial marriages and a valuable external buttress to the stability of marriages during the difficult early years. It therefore helps to achieve one of the main objectives of a good divorce law'.[4]

However, the provision is unsatisfactory for a number of reasons:

(a) Although such a provision may be beneficial in England where to a greater extent marriage is an individual affair, its relevance in Nigeria is questionable. Before a decision to institute divorce proceedings is made, efforts to recon-

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1. Cf. Bowman v. Bowman [1949] 2 ALL E.R.127, C.A.; [1949] P.353; W. v. W. [1966] 2 ALL E.R. 889 [1967] P. 291.

2. [1962] W.R.N.L.R. 328.

3. See S. 30(4) Matrimonial Causes Decree, 1970.

4. 'Field of Choice', para. 19; see also Morton Royal Commission on Marriage and Divorce, 1956, Cmd. 9678, para. 215; 'Putting Asunder', pp. 116-117 and para 78.

cile the parties would have been made by their respective families. A compulsory waiting period can only prolong the agony of the applicant and produce added bitterness between the spouses.

(b) The provision seems to run contrary to the aim of the new divorce law, which is to end marriages which have irretrievably broken-down, with the least amount of bitterness, distress and humiliation. Subjecting the spouses to two gruelling public exposures of their private affairs, in order to achieve a divorce, does not promote this aim.

(c) Financial hardship may be imposed on a wife whose marriage has broken down immediately after the wedding, but who needs maintenance from her husband for herself or any child of the marriage. Unlike the wife in England, she is unable to claim maintenance unless she brings a suit for divorce, nullity of marriage, judicial separation, restitution of conjugal rights or jactitation of marriage. Since a suit for dissolution of the marriage within two years is denied to her, her only alternative unless the peculiar circumstances of the case justify a suit for jactitation of marriage, is to bring a suit for restitution of conjugal rights, which in many cases would be impractical if the marriage has truly broken down, or judicial separation which involves bringing a suit for divorce, after two years, in order to regain her freedom to remarry.

(d) The provision may have the effect of promoting illicit relations, since the spouses may not be prepared to wait for two years before forming other relationships.

(I) <u>The effect of the new divorce law</u>.

A great deal of apprehension has been expressed at the ease with which a divorce may be effected under the provisions of the Matrimonial Causes Decree, 1970, especially under its 'living-apart' provisions. Oputa, J., expressed the main reason for the apprehension:

> The facility and ease with which a dissolution of a marriage can be procured

> under Decree No.18 of 1970 is disturbing and I may add ominous to the erstwhile compact unity and permanence of the African family and one wonders whether enough thought was given to the effect and impact of this Decree on the social and moral structure of the African family.[1]

With due respect, it must be pointed out that this sentiment[2] ignores the customary laws of divorce, and disregards the social reality of life in Nigeria. Very few Nigerians contract a statutory marriage only. In most cases, persons who marry under the Nigerian Marriage Act combine it with a marriage according to their respective customary law. Comparison of the laws of divorce under customary law, and under the Matrimonial Causes Decree, 1970, shows that it is easier to effect a divorce under customary law than it is under the Decree. The stability of African family life has never been dependent on the difficulty of effecting a divorce. The stability of marriage in traditional Nigerian societies has been due mainly to the attitude of society towards the marital relationship.

This attitude has now changed. This is evidenced by the fact that no social stigma now attaches to a divorced woman, as it did in many traditional societies. As a result, the families of the spouses do not make strenuous efforts to reunite the parties when there is a breach, and in many cases, they may actively precipitate or encourage the breach. Many Nigerian women today marry with no intention that the marriage should last. The marital status is a prestige symbol which must be achieved at all costs, but once attained, the need or desire to retain it is not equally pressing.

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1. Agunwa v. Agunwa [1972] 2 E.C.S.L.R.20.

2. See also the adverse comments of Egbuna, J., in Ogbogu v. Ogbogu [1972] Suit No. O/8D/71, unreported, Onitsha High Court, 13 April 1972; and Agbakoba, J., in Nnebuwa v. Nnebuwa [1973] Suit No. O/ID/73 unreported, Onitsha High Court of 7 December 1973.

Increasing marital instability is an international phenomenon. The recognition of this fact by most countries has resulted in a change in their divorce laws, so as to allow the spouses to end their marriage as peaceably as possible.

If the permanence of African marriage is threatened, it is due to the changing attitudes of Nigerian society and not to the ease with which a divorce may be obtained.

A casual reading of the provisions of section 15 of the Decree might give the false impression that divorce is easy to obtain under the statute, but the various kinds of absolute and discretionary bars[1] aimed at preventing divorce on demand, and the restrictive interpretations given to some of the provisions of the Decree by the courts, negative such a view. It has been seen that, even in cases where the marriage has irretrievably broken down, a divorce has been refused by the courts for one reason or the other.[2]

Of 115 divorce petitions heard in the Lagos High Court from March 1970 to December 1970, which were decided according to the provisions of the Matrimonial Causes Decree 1970,[3] only 45 (39.1 percent) of them were successful. This may be compared to the 73 cases heard in 1969, before the commencement of the Decree in the same court in 31 (42.4 percent) of which a divorce was granted.[4]

There is evidence that the Decree has helped a few persons whose spouses had refused to divorce them under

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1. See S. 17 Matrimonial Causes Decree, 1970.

2. See e.g. Odaje v. Odaje [1972]10 C.C.H.C.J.100; Abisuga v. Abisuga [1974] 6 C.C.H.C.J. 819.

3. The provisions of the Decree came into force on 1 March 1970, and it provided that a matrimonial cause instituted before the commencement of the Decree, but not completed, shall be continued and dealt with only in accordance with the provisions of the Decree. See S.1(1) Matrimonial Causes Decree, 1970, Decree No. 18 of 1970.

4. Statistics compiled by the writer from details in the Divorce Register of the Lagos High Court.

the old law, which made it impossible for an innocent spouse to be divorced against his or her will. Such persons were able to effect a divorce by relying on the three year 'living apart' provisions of the Decree. Begho v. Begho,[1] and Majekodunmi v. Majekodunmi,[2] are cases in point. The advantage here is that many of these spouses would be able to legalize their stable but illicit relationships with other persons - the declared intention of the petitioner in Majekodunmi v. Majekodunmi,[3] where the parties had been separated for more than forty-six years, had led entirely separate lives, and where the petitioner had children with other women, but had lived continuously for twenty-four years with the woman he proposed to marry. The wife, who had apparently committed no matrimonial offence, objected to the grant of a divorce. Adefarasin, Ag.C.J., held that it was not conducive to the public interest that men and women should be bound together in marriage the duties of which had long ceased.[4]

Generally, the Decree has produced no flood of divorce cases, and can in no sense be regarded as a 'Casanova's charter'.[5] Table 11:1 shows the number of divorce

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1. [1970] Suit No. W/53/70, unreported, Wani High Court, 31 July 1970.

2. [1974] 6 C.C.H.C.J. 809.

3. Ibid., see also Adam v. Adam [1977] 4 C.C.H.C.J. 703.

4. Majekodunmi v. Majekodunmi [1974] 6 C.C.H.C.J. 809.

5. Lady Summerskill, a leading feminist referred to the English Divorce Reform Bill as 'Casanova's charter'. See the comments of Lord Stow Hill on the second reading of the Bill in the House of Lords, on 30 June 1969, 'This Bill has been described as a 'Casanova's charter' - an odd charge to level against the Archbishop's Group... Casanovas do not bother with charters. If they did they would be grievously disappointed with the contents of this Bill. This Bill does not open the door to easy divorce. That door is wide open now under the existing law, and it would be hard to open it wider'.

TABLE 11:1

DIVORCE PETITIONS BROUGHT IN THE LAGOS HIGH COURT

Year	Total Petitions	Wife Petitioner		Husband Petitioner	
		No.	% of total	No.	% of total
1964	41	20	48.79	21	51.21
1965	62	37	59.68	25	40.32
1966	53	32	60.38	21	39.62
1967	57	34	59.65	23	40.35
1968	65	43	66.15	22	33.85
1969	73	49	67.12	24	32.88
1970	115	63	54.78	52	45.22
1971	97	60	61.86	37	38.14
1972	132	79	59.85	53	40.15
1973	113	61	53.98	52	46.02
1974	121	73	60.33	48	39.67
1975	140	-		-	
1976	144	-		-	
up to 29/9/77	83				

Source: Compiled from details in the Divorce Register of the Lagos High Court.

petitions heard in the Lagos High Court from 1964 to 27 July, 1977. It is seen that, apart from the years 1970 and 1972, although there has been a fairly steady increase in the number of petitions brought, the rate of increase has not been high. The increase must also be counterbalanced against the fact that there has been a greater increase in the number of statutory marriages contracted. For example, the number of statutory marriages celebrated in Lagos in 1973 was 1716. In that year, 113 divorce petitions were brought to the Lagis High Court. The number of divorce petitions was 6.58 percent of the number of marriages contracted. In 1975, the number of divorce petitions had

risen to 140, but the number of statutory marriages contracted had also risen to 2306. The number of divorce petitions was thus 6 percent of the number of marriages. It is also relevant to note that from the statistics given in Table 11:1, wives are more commonly petitioners for divorce than are husbands[1]: in every year but one, wife-petitioners outnumber husband-petitioners. In the years 1965, 1966, 1967, 1968, 1969, 1971, 1972 and 1974, sixty or more percent of divorce petitions was brought by wives. In 1970, 54.78 percent of divorce petitions was brought by wives.[2]

6. DISSOLUTION OF MARRIAGE BY DEATH

The death of either party to a statutory marriage automatically terminates the marriage. As a result any children subsequently conceived by the wife belong to the natural father, and the widow has no legal obligation to remarry any member of the deceased husband's family.

7. Summary and Conclusion

A. Summary

Many of the rights and duties of the spouses which attach to a customary law marriage do not differ significantly from those which pertain to a statutory marriage. Thus the spouses of both types of marriage have a duty to consummate the marriage, and wilful refusal to do so would be a valid ground for divorce in both types of marriages. Again, in

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1. See Table 11:1; Cf. this with the position in customary and Islamic law marriage where wives suing for divorce are always more numerous than husbands petitioners.

2. This may be compared to the position in England where petitions for divorce by wives constituted sixty percent or more of all petitions brought in 1971, 1972, 1973, and 1974. See Civil Judicial Statistics Annual Report, 1974, Cmnd 6361, Table E.5.

both types of marriage the husband has a duty to provide his wife with living accommodation, and the spouses have a duty to cohabit with each other, although by mutual consent the cohabitation need not be under the same roof. Similarly, wives of both types of marriage may adopt their husband's surname if they wish to do so. Any prohibitions in this respect, which may have been imposed by customary law, have been abolished by popular practice.

There are, however, certain important differences between the incidents of the different types of marriage which have been discussed in this chapter.

(a) In a customary law marriage the husband has an exclusive right of sexual intercourse with his wife and may maintain an action for damages for a breach of this right. This exclusive right is, however, denied to the wife. The spouses of a statutory marriage, both husband and wife, have an exclusive right to the sexual embraces of each other, and the wife of a statutory marriage is entitled to claim damages from a woman who infringes her exclusive right in this respect, whether or not the woman purports to be also a 'wife' of the husband. This difference of course is the natural result of monogamy, which is exclusive to a statutory marriage, and which represents the main difference between a customary law marriage and a statutory marriage.

(b) The rules of the affiliation of a child conceived during a statutory marriage differ from those of a customary law marriage. The fact of marriage does not <u>ipso facto</u> confer legal paternity on the husband of a statutory marriage. Either party may give evidence to prove that a child conceived or born during the continuance of the marriage is not the natural child of the husband. In a customary law marriage, while the husband has an option to reject legal paternity of a child born to his wife during the marriage on the ground that he is not the natural father, the wife, provided the dowry has not been repaid at the time of the child's conception, except where local legislation or the courts allow her to do so, may not challenge the legal

paternity of her husband, even though there is abundant proof that he could not be the natural father.

(c) The welfare of the child is the main consideration in awarding custody in both types of marriage at the present time. Many Customary Court judges, however, because of their attachment to the contrary provisions of traditional customary law, invariably award custody to the father, except where they are forced to observe local legislation, or fear that their decision may be overruled on appeal.

(d) Certain evidential and other rules which apply to the spouses of a statutory marriage are denied to the spouses of a customary law marriage.[1]

(e) The husband of a statutory marriage has a common law duty to maintain his wife. The existence of such a duty is doubtful in the case of a customary law marriage, although it is an enforceable duty in Islamic law marriage. There is controversy, however, as to how far the wife of a statutory marriage can enforce this duty under the Matrimonial Causes Decree, 1970, unless she brings a petition for the dissolution of the marriage or other 'matrimonial cause', as defined by section 114(1) of the Matrimonial Causes Decree. The wife of a statutory marriage may pledge her husband's credit for the provision of necessaries, a right also available to the wife of an Islamic law marriage but not to the wife of a customary law marriage.

(f) As far as the dissolution of a marriage by divorce is concerned there is an important procedural difference. A statutory marriage may only be dissolved by a decree of dissolution pronounced by a court of competent jurisdiction. Extra-judicial divorces, which are possible in both customary and Islamic law marriages, are denied to the spouses of a statutory marriage.

(g) Although the Matrimonial Causes Decree provides that

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1. For example the rules of evidence relating to communications between the spouses during the subsistence of the marriage, see further, above, pp. 216-218.

proof of irretrievable breakdown shall be the only ground on which a divorce may be obtained, a principle consonant with divorce under customary law, to prove irretrievable breakdown, specific facts must be established, and most of these facts involve some measure of guilt in the respondent. The restrictive interpretations given by some courts to the provisions of the Decree have further derogated from the principle of irretrievable breakdown. Finally, the absolute and discretionary bars in the Decree, which prohibit the grant of a divorce decree in some cases, are incompatible with the principle of irretrievable breakdown. The result is that dissolution of a statutory marriage is more difficult to achieve than in the case of a customary or Islamic law marriage.

(h) Except in certain circumstances, a suit for the dissolution of a statutory marriage may not be presented within two years of the celebration of the marriage. No such bar exists in customary law marriages.

B. Conclusion

One of the avowed desiderata of the framers of the original marriage legislation was to elevate the legal status of women, especially in relation to certain incidents of customary law marriage.

It is difficult to assess the extent to which the introduction of statutory marriage has directly affected the legal status of women who have contracted such marriages in Nigeria. Theoretically, the advantages of a statutory marriage are many, but most of these advantages are rendered nugatory in actual practice, for one reason or another. The main reason seems to be the fact that a statutory marriage is almost invariably combined with a marriage by customary law, appropriately termed a 'double-decker marriage'.

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1. See James S. Read, 'The Law of Husband and wife in East Africa', in Integration of Customary and Modern Legal Systems in Africa, papers presented at the Conference held at Ibadan in 1964 and published in 1971, pp. 396-409 at p. 397; see further, above, Chapter X.

The actual position of a wife of a 'double-decker marriage' does not differ significantly from that of a wife married under customary law alone.

Once a statutory marriage is contracted, as far as the marital rights and obligations of the spouses are concerned, so long as marital relations remain intact and the parties are living amicably, there is no discernible difference in the attitude of the spouses towards each other, in the two types of marriages. In other words, the fact that the marriage is a statutory one, does not generally operate on the minds of the spouses so as to affect their behaviour towards each other. A husband prone to cruelty does not refrain from chastising his wife because he remembers that he is married to her under the Nigerian Marriage Act. He would administer punishment regardless of the type of marriage contracted.[1] The catalogue of cruelties perpetrated by the spouses of statutory marriages, which is revealed by a study of the divorce cases, bears ample testimony to the fact that there is no discrimination of treatment according to the type of marriage.

The pattern of behaviour of the spouses, allowing for individual differences, conform to the pattern of marital life in their particular sector of the community, and not to the type of marriage contracted. An observer of family life in a village would be unable to discern the spouses of a statutory marriage from their marital conduct. A more valid distinction can perhaps be drawn according to the social status of the parties, The wife of a poor farmer who lives in a village, and is married under the Nigerian Marriage Act, is expected to behave, and is treated in the same manner, as her counterpart in a customary law marriage.

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1. It should be noted that although allegedly a husband in customary law is permitted to chastise his wife within certain limits, physical chastisement of a wife, regardless of the type of marriage is a crime under the Criminal Code Act, see Criminal Code Act, Cap 42, Laws of the Federation of Nigeria, 1958, S.351.

The educated, sophisticated wife of a Senior Civil Servant, on the other hand, whatever the type of marriage contracted, may be able to enforce certain obligations on her husband, suitable to their social status. For example, she may be able to insist that her husband provide money for the maintenance of the matrimonial home without any contribution from her. But even here, caution must be exercised, because there is little difference between what is expected of an educated professional wife, and her less sophisticated sister in so far as marital duties and obligations are concerned.

In most cases, the spouses are not even aware of the different incidents attached to each type of marriage.

Two of the most obvious advantages of statutory marriages are that parental consent for non-minors, and the payment of dowry, are not necessary for the validity of the marriage. These advantages may, however, be rendered ineffective by the insistence of Nigerian women on the celebration of a customary law marriage, in addition to the statutory marriage. Although the celebration of a statutory marriage may act as a lever to force parents to consent to a customary law marriage, dowry is payable, and since there is no fixed national level, any amount may be demanded in most States. The woman who asserts her independence and contracts a statutory marriage without parental consent, and hence without payment of dowry, may lose the friendship and support of her family, an important factor in the Nigerian social context. She may also suffer a loss of social prestige, where no dowry has been paid on her behalf. Non-payment of dowry, as a result, may affect the stability of her marriage. The theoretical benefits conferred by the Marriage Act in this respect, are not as great as would be imagined, in practical terms.

Another illustration of the gulf between the theoretical provisions of the Marriage Act, and the practical application of those provisions, is in the sections of the Act aimed at protecting monogamy. Many men who contract statutory marriages under the Marriage Act subsequently

purport to marry additional wives under customary law, although legally the statutory marriage is monogamous. The fact that such purported marriages are illegal, or that a wife can obtain a divorce on the ground of her husband's adultery with these 'wives', is cold comfort to the wife, especially where she is of advanced years, and cannot hope to remarry, or has no substantial sources of maintenance. As will be seen later, the meagre sums given by the courts to divorced wives as maintenance do not justify the inconvenience and publicity involved in a divorce suit.

Children produced from such illegal marriages have been allowed by the courts to share in the intestate estate of the husband, in a few cases, thus frustrating the legitimate expectations of the wife and her children. If the husband contracts a 'purported' marriage under the Marriage Act, or any other statutory marriage, although such a purported marriage is void, the 'wife' and children of the void marriage are entitled to claim maintenance and other financial benefits from the husband under the Matrimonial Causes Decree, 1970.

In the present state of the law, even though a wife of a statutory marriage has a right to be maintained by her husband during the marriage, she may not be legally able to enforce this right except by the dubious method of pledging her husband's credit, unless she institutes an action for divorce, restitution of conjugal rights or other 'matrimonial cause' as defined by the Matrimonial Causes Decree.

Similarly, a wife of a statutory marriage is entitled to claim maintenance from her husband after a divorce. The level of maintenance awarded to a wife in Nigeria, as will be seen later, is unrealistic and bears no relation to the actual cost of living, and in most cases,

no relation to the earning capacity of her husband. The prohibitive costs of a divorce suit expended in order to extract such meagre sums of money discourage wives from instituting divorce suits. In many cases, the costs of bringing the action awarded by the courts, usually against the husband, do not represent the real costs involved, and in such cases the wife is left out of pocket.

The wife of a statutory marriage also faces the possibility of maintaining her husband after a divorce. Many husbands do ask for such ancilliary benefits in their divorce petitions, although there seems to be no reported decisions where a divorced wife was ordered to pay maintenance to her husband.

If the wife of a statutory marriage wishes to divorce an undesirable husband, she may find a real obstacle in the prohibitive expense involved in securing a divorce. The option of dissolving the marriage extra-judicially is not available to her, even where the husband consents to a divorce. On the other hand, the alleged 'security of tenure' of a statutory marriage, at best only lasts for three years, since three years separation entitles the husband to a divorce whether the wife consents or not.

PART FOUR

Property Rights

Chapter XII : The Property Rights of Women During Marriage and on Divorce

Chapter XIII : Rights of Succession

CHAPTER XII
THE PROPERTY RIGHTS OF MARRIED WOMEN

1. General Introduction

Two declarations of the United Nations provide an appropriate starting point for a discussion on the property rights of Nigerian women in relation to marriage.

Paragraph 1 of Article 6 of the United Nations' Declaration on the Elimination of Discrimination Against Women reads:-

> Without prejudice to the safe-guarding of the unity and the harmony of the family, which remains the basic unit of any society, all appropriate measures, particularly legislative measures shall be taken to ensure to women, married or unmarried, equal rights with men in the field of civil law and in particular
>
> (a) the right to acquire, administer, enjoy, dispose of and inherit property, including property acquired during marriage.[1]

Similarly, the Economic and Social Council of the United Nations, noting that the legal systems of many countries result in a subordinate status of the wife in family matters of fundamental importance and that under numerous legal systems women are, during marriage, deprived of important personal and property rights,

> recommends that governments
>
> (a) Take all possible measures to ensure equality of rights and duties of husband and wife in family matters
>
> (b) Take all possible measures to ensure to the wife full legal capacity, the right to engage in work outside the home and the right, on equal terms with her husband to acquire, administer enjoy and dispose of property.[2]

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1. United Nations, Secretariat, Human Rights: A Compilation of International Instruments (Pub.E.73), (New York 19) XIV.2.

2. United Nations, Economic and Social Council, Resolution 503D. (XVI), 736th Plenary Meeting, 23 July 1953.

The allegedly inferior proprietary rights of African wives, especially under customary law, have been the subject of adverse criticism by many writers, and have largely contributed to the low status assigned to African women by observers of African family life. Indeed, the nature of the legal control exercised by women over their property, particularly the products of their own labour and any income which may accrue from them, is a valuable index of their status in any society.

Property rights of the spouses during marriage may be important in certain circumstances; for example, in the case of a creditor who seeks repayment of a debt contracted by either spouse. But generally speaking, so long as the marriage relationship is unimpaired, rights in matrimonial property are largely of academic interest. If the spouses are living together happily in the matrimonial home, it is of little practical consequence whether the house or its contents belong to one, or other of the spouses. As was observed by the English Law Commission in its Working Paper on Family Property Law:

> While a marriage is happy, the home will normally be used for the benefit of the family irrespective of who owns it. But when a marriage breaks down, it becomes important to the spouses to know the extent of their rights in relation to the home.[1]

In most cases, the property of one spouse is used by the other without much concern as to the legal ownership. Individual ownership is less emphasized in most traditional African society than it is in European society. Many items of property, especially land, are thought of in terms of collective rather than individual ownership.[2]

The need for precise definition and formulation of

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1. The Law Commission, Published Working Paper, No.42, Family Property Law, 26 Oct., 1971, p. 33, par. 1.2. The Working Paper is now replaced by The Law Commission, (Law Com. No. 52) First Report on Family Property: A New Approach, H.C. 22 May 1973.

2. See further, below, p. 335.

rights in property, as between the spouse to a marriage, normally arises either when the marriage breaks down before the death of one of the spouses, resulting either in separation or divorce, or when one of the spouses dies. Disputes over marital property rights may engage the attention of the courts after a separation or divorce, but in the Nigerian context, most often when one spouse dies. The ownership and enjoyment of property then become prime considerations.

The three systems of marriage laws operative in Nigeria have different rules pertaining to the property rights of wives which show interesting variations.

The topics considered in the following two chapters are:

1. the nature and ownership of property in Nigeria;
2. the property rights of wives in each type of marriage during the subsistence of the marriage;
3. the property rights of wives on separation or divorce;
4. devolution of property on the death of one of the spouses - succession.

The first three topics will be discussed in this chapter, and the fourth in the chapter which follows.

2. The Nature of Property Rights in Nigeria.

It is necessary to indicate briefly the nature of property rights which exist generally in Nigeria, in order to give a clearer understanding of the rights which may be held by the spouses. Such an understanding is especially important in relation to the law of succession.

It is convenient to discuss property rights in two stages:

A. types of property;
B. rights in property.

A. Types of property

English law classifies property as 'real' and 'personal', while many continental legal systems adopt the Roman method of classification of property as 'movable' and 'immovable'.[1] Most writers on customary property law in Nigeria have adopted the Roman system of classification of property, rather than the English system.[2] The several subjects of proprietary rights under customary laws are more conveniently accommodated under a division of property into immovable and movable. Since the concept of property, and the rights of a person to acquire and deal with property are defined in terms of customary law principles, the classification of property into immovable[3] and movable property will be maintained here. It should be noted, however, that although this division is convenient when discussing the customary law of property, the Islamic law of inheritance makes no distinction between the various types of property: movable and immovable, realty and personalty, ancestral and self-acquired, all make up a single entity -

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1. See Crossley Vaines, Personal Property, 5th edit. by E.L.G. Tyler and N.E. Palmer, (London: Butterworths, 1973), pp. 3-18; Robert Megarry and H.W.R. Wade, The Law of Real Property, 4th edit. (London: Stevens and Sons Ltd., 1975), pp. 10-12. In Roman law things were classified, inter alia, as immovable (res immobiles or res soli), and movables (res mobiles), and the division exists in modern times in most continental systems of law; see also Re Hoyles [1911] 1 Ch. 179 at p. 185.

2. See e.g. Okoro, The Customary Laws of Succession in Eastern Nigeria, 1966, op. cit., pp. 10-11; G.B.A. Coker, Family Property Among the Yorubas, 1958, 1966, op.cit., p. 39; Ajisafe, Laws and Customs of the Yoruba People, op. cit., p. 8; Obi, The Ibo Law of Property, 1963, op. cit., p.30.

3. S.3, Interpretation Act, Cap 89, Laws of the Federation, provides that 'immovable property or "lands" include land and everything attached to the earth or permanently fastened to anything which is attached to the earth and all chattels real'. See also the corresponding provisions in the laws of the various states. Cf. the definition of 'land' in S.2 Property and Conveyancing Law 1959, of the former Western State of Nigeria.

the estate of a person.[1]

(1) Immovable property.[2]

Immovable property includes land, trees, crops, and buildings. Pledges and leases held on these forms of property are also classified as immovable.

Land is the most important category of immovable property and will be treated further in the discussion on ownership of property. Trees included in immovable property may be economic trees, such as palm, kola, rubber, orange or other fruit trees, and timber. The nature of agricultural crops has already been noted.[3]

Leases and pledges of land and economic trees, have long been recognised under customary law in most parts of Nigeria. Leases have now been extended to buildings to a large extent, in all parts of the country.[4]

Buildings in the traditional society were mainly for habitation, and were relatively simple in structure and design. Equiano, the Igbo writer who was captured from Igboland during the eighteenth century and taken to England as a slave, in his memoirs, describes the traditional houses of his people thus:

> These houses never exceed one storey in height. They are always built of wood or stakes driven into the ground crossed with wattles, and neatly

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1. See Coulson, Succession in the Muslim Family, 1971, op. cit., p. 2, Fyzee, Outlines of Muhammadan Law, 1949, op. cit., p. 226; see also the observation of Sir John Beaumont in Sardar Nawazish Ali Khan v. Sardar Ali Raza Khan [1948] 75 I.A.,62 at pp. 77, 79; Fyzee Cases, op. cit., 342.
2. 'Immovable property' means land, and land 'includes any building and any other thing attached to the earth or permanently fastened to anything so attached but does not include minerals'; S.18(1) Interpretation Act, 1964.
3. See above, Chapter I, pp. 126-127.
4. See Elias, Nigerian Land Law, op. cit., Chapter 12; B.O. Nwabueze, Nigerian Land Law, (Enugu, Nigeria: Nwamife, Publishers Ltd., 1972), Chapters 9 and 10.

> plastered within and without ... Houses so constructed and furnished require but little skill to erect them. Every man is a sufficient architect for the purpose. The whole neighbourhood afford their unanimous assistance in building them and in return receive and expect no more recompense than a feast.[1]

Many of these traditional houses are still to be found in the rural areas of Nigeria, especially in the Northern States. They are, however, rarely seen in the main towns, and may be entirely replaced in some parts of the country, for example, Onitsha. In the inland town where most indigenes of Onitsha live, there are no thatched houses. Information solicited about the absence of such houses in Onitsha revealed that the last two remaining thatched houses there were destroyed during the Nigerian Civil War, and had never been rebuilt. It was, therefore, surprising to find that there are many thatched houses in Calabar. It may be remembered that Calabar was one of the first places penetrated by Europeans, and it is now the capital city of Cross River State. Informants say that the reason for the relatively small number of modern houses in Calabar is due to the fact that before the creation of States in Nigeria, indigenes of Calabar tended to work and live away from home. As a result, they built modern houses in the places where they lived and worked, rather than in their homeland. There has been a reversal of this pattern, evidenced by the number of modern buildings which were in the process of construction at the time field-work was conducted in Calabar.

Dwelling houses built of concrete, several storeys high, and elaborate in design, are a common feature in all parts of Nigeria at the present time. The ambition of every modern Nigerian man is to own a splendid residence in his own village or town, regardless of what he may own elsewhere. The number of such 'palatial' houses which exist

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1. Equiano, Equiano's Travels, op. cit., p. 6.

even in the smallest village, sometimes providing an incongruous contrast with the surrounding thatched buildings and the general landscape, testifies to the fact that for many, such ambitions are fulfilled.

(ii) Movable property.

Movable property in traditional society was relatively limited. It included:

(a) livestock - such as pigs, goats, cattle, poultry, and dogs;

(b) household furniture, utensils etc. - these were simple in structure, relatively few in number, and in most cases locally made;

(c) tools and weapons, implements of husbandry, such as hoes, axes, and shovels, fishing boats and other fishing gear, articles of trade, articles of defence such as firearms bows and arrows;

(d) wearing apparel and ornaments (in many parts of the country women were forbidden to wear clothes;[1] wearing apparel therefore consisted mainly of items of jewelry, especially ivory and coral beads; jewelry was important for both men and women);[2]

(e) money, known in different parts of the country as manillas cowries or rods; money was not extensively used, and before the advent of Europeans trade was relatively unimportant.[3]

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1. See Basden, Among the Ibos of Nigeria, 1921, op. cit., p. 90; 'the men always put an embargo on feminine apparel and until recently have deliberately barred the use of clothing'; see also Meek, The Northern Tribes of Nigeria, op. cit., Vol.1, p. 40; some groups in the North 'refuse to allow their women to wear any type of clothing at all, on the ground that if the women wore clothes they would become beautiful and be desired by men of foreign villages'.

2. They were, however, mainly worn by the kingly and chiefly classes; see Talbot, The Peoples of Southern Nigeria, Vol. III.

3. For forms of property in the traditional society see Mary Kingsley, West African Studies, op. cit., pp. 439 et al.

The range of movable property has increased considerably in modern Nigeria. The most remarkable change, perhaps, is the emphasis placed on the importance of money. Movable property now includes money, which may be money in the bank or other savings institution, such as thrift clubs;[1] employment benefits in the form of superannuation or pensions; stocks, shares or other investments; luxurious cars and other vehicles; valuable items of household furniture, clothing and jewelry. In short, movable property in Nigeria today, does not differ essentially from such property found in any European society, although it may be more unevenly distributed among the population.

The difference in the types of property owned in the traditional and modern society is of special importance to the legal status of women in general, and to married women in particular. To deprive a married women of the legal ownership of a few simple household articles, two or three pieces of cloth, or simple items of jewellery she may possess, is very different from denying her rights to the varied and expensive items of movable property which she may now accummulate before, or during a marriage. Similarly, it imposes no great hardship, and occasions no substantial injustice, if a wife is deprived of inheritance rights in her husband's thatched house, or of the right to

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1. Thrift clubs are known among the Igbos as isusu; among Eket Ibibios as osusu; and among the Yorubas as esusu; 'Esusu is a universal custom for the clubbing together of a number of persons for monetary aid. A fixed sum agreed upon is given by each at a fixed time (usually every week), and place, under a president; the total amount is paid over to each member in rotation. This enables a poor man to do something worthwhile where a lump sum is required. There are laws regulating the system'. See Johnson, The History of the Yorubas, op. cit., p. 119. Also Fadipe, op. cit., p. 137; it is interesting to note that an identical custom obtains in Guyana, where it was probably taken by the slaves from West Africa. In Guyana the system is known as 'box' among the local people.

inherit the other few simple items of property he may have owned in traditional society. A similar house could be built elsewhere (land was not in short supply), in one day, at no cost, other than, perhaps, the provision of a meal for the people helping to build the house. The position is different when a widow is deprived of rights in the matrimonial home costing several thousands of nairas, to which she has invariably contributed indirectly, and, very often, directly as well. Many Nigerian wives are expected to maintain the matrimonial residence, while their husbands finance the building of a home in the husbands' native villages or towns. In addition, Nigerian husbands now own cars, money in the bank, and other expensive movable property.

These differences in the type of property owned by Nigerians around the latter part of the nineteenth century, and in contemporary society, are of fundamental importance, and will be elaborated further in the next chapter.

B. Rights in ownership of property

(i) Introduction

It is necessary first of all to define ownership. As used herein ownership may be summarised as the totality of rights and powers that are capable of being exercised over a thing. These rights and powers include 'the right to make physical use of a thing, the right to the income from it, in money, in kind or in services, and the power of management, including alienation'.[1] 'The real essence of ownership,' says Nwabueze, 'lies in the power of alienation; it connotes essentially the totality of the rights of disposal over a thing. The right of disposal is not only the most conclusive but also the most valuable

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1. Frederick H. Lawson, Introduction to the Law of Property, (Oxford, Clarendon Press, 1958), p. 8.

incident of ownership'.[1]

To identify the right of alienation with ownership is especially important in dealing with Nigerian property law. 'Ownership' in the context of village property terminology is a nebulous affair.[2] This fact is quite evident to any researcher who attempts to find out from a village community the rights of individuals or groups in property. Very often an emphatic assertion of ownership is made. Further questioning, however, as to whether the 'owner' can dispose of her property as she wishes, reveals that all the 'owner' possesses is a right of user, usually for life. The essential right of alienation, which differentiates ownership from other property rights, is, especially in the case of women 'owners', very often lacking. As Lord Cohen observed while delivering the judgment of the Privy Council in Enimil v. Tuakyi;[3]

> It seems clear from the authorities ... that the term owner is loosely used in West Africa. Sometimes it denotes what is in effect absolute ownership; at other times it is used in a context which indicates that the reference is only to rights of occupancy ... This looseness of language is, their Lordships think, due very largely to the confused state of the land law in West Africa as it now stands. As appears from the report made in 1898 of Rayner C.J. on Land Tenure in West Africa which was cited by Viscount Haldane delivering the judgment of this board in Amodu Tijani v. Secretary Southern Nigeria[4] there has been introduced into the native customary law, to which the notion of individual ownership was quite foreign, conceptions and terminology derived from English law. In these circumstances it is not surprising that it is difficult to be sure what is meant in any particular case by the use of the expression owner.[5]

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1. Nwabueze, Nigerian Land Law, op. cit., p. 7.
2. See Leith-Ross, African Women, op. cit., p. 102; C.K.Meek, Land Tenure and Land Administration in Nigeria and the Cameroons (London: Her Majesty's Stationery Office, 1957), p. 163; Thomas, Anthropological Report on the Ibo-Speaking Peoples, op. cit., Part I, p. 126.
3. [1952] 13 W.A.C.A. 10.
4. [1915-1921] 3 N.L.R.[1921] 2 A.C.399.
5. Enimil v. Tuakyi [1952] 13 W.A.C.A.10, at p. 14.

Ownership of property in Nigeria may be vested in a community, a family or an individual. Although the main concern of this chapter is individually owned property, 'family property' is such an important feature of Nigerian property law that no account of rights in property can be readily appreciated without reference to the institution of family property. Accordingly, the nature of family property, and contrasted with individual property, will be briefly indicated.

(ii) Family property

The subject of family property is vast and fascinating. Unfortunately only a brief account can be given here, but there are excellent books and articles on the subject.[1]

The property of the family is any type of property, the title to which is vested in the family as a corporate entity. Although all types of property may be the subject of family property, it is in relation to land that the system is best appreciated.[2]

Of all the indigenous institutions existing today in Nigeria, none is quite as important as land tenure. Theoretically, land belongs not to man, but to God. Human beings

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1. See e.g. Coker, Family Property among the Yorubas, 1966, op. cit.; B.O. Nwabueze, Nigerian Land Law, op. cit., esp. Chapter 3; Elias, Nigerian Land Law, 1971, op. cit., Chapter 5.

2. There was a broad distinction between land rights in the Northern and Southern parts of Nigeria. In the North, all land was held under the Land and Native Rights Proclamation, 1910 (as re-enacted in Land Tenure Law, 1962), in trust for the people, by the State. Its disposition was under State control, and no title to the use and occupation of land was valid without the consent of the State (formerly Governor). In the South, lands were not under the disposal or control of the State. Most of the lands were held by lineages and families. But see the recent Land Use Decree, 1978, Decree No.6 of 1978.

merely have use of the land.[1] But the use of the land is not only for the living. Land belongs to the ancestors, and it is envisaged that it will also be used by future generations yet unborn. This idea was most forcefully put by a Nigerian Chief thus:

> I conceive that land belongs to a vast family of whom many are dead, few are living and countless members are still unborn.[2]

Early acquisition of land was accomplished by settlement of virgin land. This could be achieved either by a group or by an individual. Land could also be acquired by conquest of weaker peoples and appropriation of their land.[3] Some of the land acquired may be allotted for the general use of the community, and such lands are usually referred to as communal land.[4]

Most of the land acquired by a group of people was allotted on a family basis, a portion of land being given to the head of each family.[5] On the death of the founder of a family his individual portion of land became the family

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1. See E.S. Craigwell Handy, 'The Religious Significance of Land', Royal African Society, 1939, Vol.38, pp. 114-123; Meek, Land Tenure, op. cit., p. 129; Meek, Land Law and Custom in the Colonies, op. cit., p. 162; Green, Land Tenure in an Ibo Village, op. cit., pp. 5 and 6.

2. per the Elesi of Odegbolu, before the West African Lands Commission in 1908 - see West African Land Commission Report, 1948, p. 183; cf. the views of Mary Kingsley: 'In West Africa there is not one acre of land that does not belong to someone, who is trustee of it, for a set of people who are themselves only the tenants, the real owner being the tribe in its past present and future state, away into eternity at both ends'. See Mary Kingsley, West African Studies, 1899, op. cit., p. 438.

3. See Mora v. Nwalusi [1962] 1 ALL N.L.R.681; Amata v. Modekwe [1954], 14 W.A.C.A.581.

4. See Nwabueze, op. cit., pp. 26-74, for a description of the nature of communal land.

5. Lord Lugard, Dual Mandate in British Tropical Africa, op. cit., pp. 280 et al.

property of his descendants.[1]

The term 'family' here used may designate the small unit referred to as the 'nuclear' family, comprising a man, and his wife or wives, and children, and probably a few dependents, who live with him. It may also mean the extended family defined by Green as

> a group of closely related people known by a common name and consisting usually of a man and his wives and children, his sons' wives and children, his brothers and half-brothers and their wives and children and probably other near relations.[2]

The extended family may be thus a very large unit, consisting sometimes of thousands of people, for example, the Amobi family of Ogidi, and the Oloto family of Lagos.

Whatever may be the size of the family, the legal rules relating to family property are the same in any one community, and may be briefly summarised:

(a) The family has a separate identity which is not affected by the demise of existing members or the arrival of new ones.[3]

(b) Each member of the family has an equal interest, but not a separate property in the family property, which cannot be disposed of inter vivos or by will.[4]

(c) The interest of each member of the family in family property is neither strictly usufructuary in the Roman sense, nor can it be equated with tenancy in common or a joint tenancy according to English land law.[5]

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1. R.W. James, Modern Land Law of Nigeria, (Ile-Ife, Nigeria University of Ife Press, 1973), p. 22; Elias, Nigerian Land Law, op. cit., p. 117; Chairman L.E.D.B. v. Sunmonu [1967] L.L.R.20.

2. Green, Land Tenure in an Ibo Village, 1941, op. cit., p.3.

3. The family, however, is not a distinct legal entity capable of being sued or of suing in the courts of law, Ekwuno v. Ifejiaka [1960] 5 F.S.C.156.

4. See Taylor v. Williams [1935] 12 N.L.R.67; Oke and Anor v. Oke and Anor. [1974] 3 S.C.1; [1974] 1 ALL N.L.R.443; Johnson and Ors. v. Macaulay and Adu [1961] 1 ALL N.L.R. 743; Ogunmefun v. Ogunmefun and Ors. [1933] 10 N.L.R.82; Davies v. Sogunro and Ors [1936] 13 N.L.R.15.

5. See Jacobs v. Oladunni Bros. [1935] 12 N.L.R.1; George and Anor v. Fajore [1939] 15 N.L.R.1; Lewis v. Bankole [1909] 1 N.L.R.82.

(d) An individual member cannot legally dispose of family property.[1] The title of a member, however, is not merely possessory, nor is he a life-tenant of his holding.[2]

(e) The offspring of a member of the family cannot be lightly disinherited from his own share by the surviving members of his own family.[3]

(f) In the past family property could not be sold under any circumstances. Individual ownership of land was unknown to customary law of many communities.[4]

(g) Family property may now be sold, or otherwise disposed of, provided the consents of all principal members of the family are given to such disposal.[5] Partition of family property may be effected by mutual consent of the members, or by order of a court.[6]

(iii) The family house

A special word is necessary about the concept of the family house in customary law. A family house in Yoruba customary law was described by Carey, J. in Coker v. Coker[7] as follows:

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1. A. Caulrick v. Harding [1926] 7 N.L.R.48; Adagun v. Fagbola [1932] 11 N.L.R.110; Miller Bros. v. Ayeni [1924] 5 N.L.R.40; Balogun v. Balogun and Ors. [1943] 9 W.A.C.A. 78; Chairman L.E.D.B. v. Ashani and Ors. [1937] 3 W.A.C.A. 143.

2. Nwabueze, Nigerian Land Law, op. cit., p. 160.

3. Lewis v. Bankole [1909] 1 N.L.R.82; Att.-General v. Holt [1915] A.C.599; [1910] 2 N.L.R. p.1.

4. Aganran v. Olushi and Ors. [1907]1 N.L.R.66; Adeniji v. Disu [1958] 3 F.S.C.104.

5. See Thomas v. Thomas and Anor [1932]16 N.L.R.5; Ricardo v. Abal [1926]7 N.L.R.58; Sule and Ors. v. Ajisegiri [1937]13 N.L.R.147. Cf. Lewis v. Bankole [1909] 1 N.L.R. 82 at pp. 96-98 and 103-104; See also Elias, Nigerian Land Law, op. cit., pp. 125-130.

6. Johnson v. Onisiwo [1943] 9 W.A.C.A.189; Onasanya v. Shiwoniku [1960] W.R.N.L.R.166; See Nwabueze, op. cit., pp. 40-49.

7. [1938]14 N.L.R.83.

> A family house ... is a residence which the father of a family sets apart for his wives and children to occupy jointly after his decease. All his children are entitled to reside there with their mothers, and his married sons with their wives and children. Also a daughter who has left the house on marriage has a right to return to it on deserting or being deserted by her husband. No one has any chargeable or alienable interest in the family house. It is only with the consent of all those entitled to reside in the family house that it can be mortgaged or sold. Generally it is the residence occupied by the person creating the family house that is nominated as such.[1]

Precise rules relating to the rights in a family house vary from community to community, but the above passage is an accurate description of the general nature of a family house.

(iv) Individual property

Individual ownership of land was virtually unknown in traditional society in Nigeria. There is abundant evidence of this fact in all parts of Nigeria.[2] The land allotted to families may be further allocated to various members of the family for their individual use, but in traditional society no individual could alienate his portion of land, nor did he become absolute owner of it.

Temple, reporting on land tenure in Sokoto Province in 1908, says:

> Unless I am greatly mistaken, the one cardinal feature of native custom with regard to the tenure of land is that under no possible conditions can a private estate exist. The essential basis of native custom is that the freehold of land belongs to the section of the population that has conquered and is in possession of that land ... and as far as the native rights in land are concerned, I cannot

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1. Coker v. Coker [1938] 14 N.L.R.83, 86.

2. See e.g. Cyril Punch, 'Land Tenure and Inheritance in Yoruba', Appendix V, in Great Benin ..., Ling Roth, 1903, op. cit., p. xxi., who maintains that the non-existence of individual ownership, and inalienability of land by sale, are almost universally expressed by natives who are willing to give an opinion', although the writer himself believes that 'the theory of individual ownership being contrary to customary law probably 'originated about fifteen years ago'.

> find that any radical difference exists between the customs obtainable in the pagan and in the Mohammedan States. There is no individual in Northern Nigeria who can, I believe, say, 'according to native law and custom say this piece of land belongs to me'.[1]

Similarly, M.R. Menendez, C.J., reporting on land tenure in the Central and Eastern Provinces of Southern Nigeria, in 1908, admitted that a native occupier in Lagos, 'may at the present time mortgage his interest in land with a right of redemption unlimited in point of time', but he categorically noted that

> In the other Provinces of Southern Nigeria, so far as I know this power does not exist. Every member of a community appears to be entitled to an allotment of as much land (within reason) as he requires, and the conditions attaching to his tenure suggests that he is entitled to hold use and enjoy his allotment as a licence in perpetuity, - subject only to the reversionary conditions above mentioned under which (inter alia) there is denied to him the power of alienation, the exercise of which would indicate individual ownership.[2]

These statements may be compared with those made by Nigerians regarding land tenure in Nigeria. For example, in Ajose v. The Queen's Advocate, Efunde and Ors.[3] Chief Faro of Ojora, who was deposed by Governor Glover in 1864, for attempting to enforce his control over land contrary to the established law, in his evidence as a white-capped Chief, gave evidence which led Smallman, J., to conclude that tenure of land

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1. Percy Girouard, Memoranda on Land Tenure and Land Revenue Assessment in Northern Nigeria, P.R.O. Africa (West) C.O.879, No. 906, May 1908, par. 22.

2. Ibid., Appendix III, Land Tenure in the Central and Eastern Provinces of Southern Nigeria, by M.R. Menendez, 9th January 1908.

3. [1892] unreported decision of the Supreme Court of the Colony of Lagos, see C.O.879, No. 906, op. cit., delivered on 14 July 1892 cited also in Amodu Tijani v. Secretary, Southern Provinces [1921] 3 N.L.R.39.

among the Yorubas represented merely the right to the beneficial use of the land. All the Assessors in Shangotola v. Idowu and Yaro,[1] decided in 1903, gave similar evidence.

In Amodu Tijani v. Secretary, Southern Provinces,[2] the Privy Council noted:

> ... the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual... This is a pure native custom along the whole length of this coast, and whenever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas.[3]

Today, individual ownership, not only in Lagos, but in all parts of Nigeria, is so prevalent, that the fact that it is a modern innovation is often lost sight of. The point is of special importance in relation to the property rights of women in modern Nigeria, and will be referred to in future discussions. It may be noted here, however, that because the law has been drastically changed, it is not often realised that land was not previously individually owned, nor was it previously sold. The alleged incapacity of women to own land could therefore not have arisen, since individual ownership of land did not exist, and sale of land was unknown. Under customary land tenure, land was owned by the community, the village or the family, never by the individual, male or female.

Individual property is usually self-acquired. Sarbah

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1. [1903] unreported decision of the Supreme Court, Lagos, decided on the 29 July, 1903, before E.A. Speed, actg. C.J., see C.O.879, No.906, op. cit.

2. [1921] 3 N.L.R.21, 3 N.L.R.50, [1921] 2 A.C.399.

3. 3 N.L.R.50 at pp. 59-60; per Lord Haldane, quoting Raynor's Report on Land Tenure in West Africa, 1898. Cf. Speed, C.J., in Lewis v. Bankole [1908] 1 N.L.R.81 at p. 83; 'It is perfectly well known that by strict ancient native law all property was family property'. See also Sunmonu v. Disu Raphael [1927] A.C.881; Larki v. Amokor and Ors. [1933] 1 W.A.C.A.323.

defines 'self-acquired' property thus;-

> Property is designated self-acquired or private where it is acquired by a person by means of his own personal exertions; without any unremunerated help or assistance from any member of his family; or without any advance or contribution from the ancestral or family possessions of his family.[1]

Property may now be acquired by an individual by means of outright purchase,[2] or by partition of family property. Leases of land and buildings from the States, or from private individual property. As early as 1909, Speed, Actg., C.J., said:

> The institution of communal ownership has been dead for many years and the institution of family ownership is a dying institution...[3]

Nwabueze, in his admirable book, Nigerian Land Law, notes that 'so prevalent is individual ownership today, that it appears to predominate over communal ownership [including family property] in the more sophisticated urban centres'.[4]

Several factors have contributed to this change in traditional ownership, and to the new commercialization of land. Among these may be mentioned the penetration of European economic and social ideas; the need of governments, companies and individuals for land on which to build churches, schools, shops, offices and houses, and industrialization, which, in particular, has attracted people from

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1. Sarbah, Fanti Customary Laws, 1904, 3rd edition, 1968, p. 89. See also Tsetsewa v. Acquah and Anor. [1941] 7 W.A.C.A. 216.

2. See Meek, Land Tenure and Land Administration in Nigeria and Cameroons, op. cit., pp. 216-221, for a description of sale of land in the early twentieth century.

3. Lewis v. Bankole [1909] 1 N.L.R. 82

4. Nwabueze, op. cit., p. 35; see also M.I. Jegede, 'The Changing Features of Family Ownership of land in Nigeria', N.L.J., No.5, 1971, p. 19 at pp. 20, 21; Amodu Tijani v. The Secretary, Southern Provinces [1921] 3 N.L.R.50; Oshodi v. Balogun [1938] 4 W.A.C.A.1; Jegede v. Eyinogun [1959] 4 F.S.C.270 at pp. 272-273.

different parts of Nigeria to the urban centres, thus contributing to the scarcity of land, and consequently to the soaring prices of land in those areas.[1]

3. Property rights during marriage.

A. Introduction.

There are three possible regimes under which matrimonial property is usually held.

(i) The unity of property

Under this system, sole control of all property of the spouses, ante-nuptial, as well as post-nuptial, vests in the husband. This was the system which operated under the English common law, whereby all the wife's personal property, and also her income, vested in her husband on marriage. During the continuance of the marriage, therefore, the wife 'could possess nothing, alienate nothing, nor bequeath anything'.[2] The principle was another manifestation of the legal unity of the husband and wife described by John Stuart Mill as 'the doctrine that what is mine is yours, but what is yours, is not mine'.[3] Until fairly recently, an English wife was totally incapable of devising either land or chattels without the direct assent of her husband, or a waiver by him of his rights in all her

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1. See Lucy Mair, Anthropology and Social Change, 1969, op. cit., p. 48; Meek, Land Law and Custom in the Colonies, p. 159; Handy, op. cit., pp. 118-119. A small plot of land, (100' x 50') in Onitsha Waterside area is sold for as much as N50,000, and the cost of a similar plot may be higher than this in certain parts of Lagos, at the present time.

2. Montmorency, 'The Changing Status of a Married Woman', 1897, op. cit., p. 194.

3. John Stuart Mill, The Subjection of Women, 1869, op. cit., p. 263.

property.

The unpractical nature of such a principle, as well as its obvious injustice to wives aroused public opinion during the nineteenth century, expressed in writings and campaigns,[1] with the result that the system was abolished in 1882.[2]

(ii) The separate-property system

The injustice of the fiction of unity gradually led to what Lord Justice James in 1877 called 'that blessed word and thing, the separate estate of a married woman'.[3] The system involved complete separation of the property of the spouses. The Married Women's Property Act, 1870, protected the wife's earnings from her husband. This Act was later repealed by the much more comprehensive measure, the Married Women's Property Act, 1882, which broadly, put husband and wife on a footing of equality as regards property. What a man owns before marriage, and subsequently acquires, is his alone; what a woman owns before marriage, and subsequently acquires, remains hers alone. Under a regime of strict separation of property, marriage has no effects on the property rights of the spouses inter se;[4] and the wife's

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1. See Francis Power Cobbe, Criminals, Idiots, Women and Minors: Is the Classification Sound?, 1869; Mill, The Subjection of Women, 1869, op. cit., Erna Reiss, Rights and Duties of English Women: A Study in Law and Public Opinion (Manchester, Sherratt and Hughes, 1934).
2. Montmorency notes that contrary to what is stated in the textbooks - that the doctrine of separate property came into existence during the reign of Queen Elizabeth - the conception of separate estate may be traced back to much earlier days: and that there are suggestions of such an idea in Bracton and in the Year Books, op. cit., p. 194.
3. See Montmorency, op. cit., p. 194.
4. There are minor exceptions, e.g. under S.17 of the Married Women's Property Act, 1882, for settling disputes between husband and wife concerning the ownership and possession of property; the Act does not apply where a woman was married before 1883 (so long as that marriage still subsists) as regards property acquired by her before that date, unless it was held for her separate use in equity, S.4(1)(a); but it seems unlikely that any property in Nigeria is still excluded in this way from the operation of the Act.

legal insubordination was replaced by 'a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other'.[1]

(iii) The Doctrine of community property

Several American States,[2] as well as some Continental countries; operate a system of 'community of property'. There are different systems of community of property, or of gains or accountability, to which attach precise rules, but generally, all property acquired by both spouses during the marriage (and sometimes also ante-nuptial property) and before the institution of divorce suit is usually held jointly by the spouses. The system is built on the idea of marriage as a partnership in which husband and wife work together as equals, and the wife's contribution to the joint undertaking, which may be solely in the form of running the home and looking after the children is regarded just as valuable as that of the husband in providing the home and supporting the family.

While the marriage subsists the husband is invariably the manager of the joint property,[3] although ideally the community property should be administered by husband and wife acting together.

When the marriage is dissolved, either by divorce or death, the community property is usually shared equally

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1. J.S. Mill, The Subjection of Women, 1869, p. 263.
2. See B. Bodenheimer, 'The Community Without Community Property', California Western Law Review, No.8, 1971, p. 381; Inger M. Pederson, 'Matrimonial Property Law in Denmark', 28 M.L.R., 1965, pp. 137-153.
3. For e.g. in seven out of the eight community property States - Arizona, California, Idaho, Louisana, Nevada, New Mexico and Washington, although the property is shared, the husband has the conclusive right to manage and control the estate - see 'Women's Legal Rights in 50 States', McCalls, Vol.98, Feb. 1971, pp. 90-95; Only Texas has eliminated this inequality by amending its community property law to provide: 'each spouse shall have sole management, control and disposition of that community property which he or she would have owned if a single person' - Texas Rev. Civ. Stats. Art. 4621.

between the spouses.[1]

The property rights of women in each type of marriage in Nigeria will be examined, in order to see the type of property regime which governs the rights and liabilities of wives in each type of marriage, and how far the wives' property rights accord with the standards set by the United Nations Declaration.

B. Customary Law Marriage

(i) Introduction.

Women's rights over property in Nigerian traditional societies, are obscured in a welter of conflicting statements made by different writers, and in the equally conflicting statements made by informants who were interviewed during field-work. When these conflicting statements are sifted, however, the picture that emerges definitely reveals that among the large majority of communities, women, including married women, were not debarred from holding movable and immovable property.

It is important to remember that personal property in the traditional society was severely limited in range and quantity among the ordinary people. The property that was generally owned by a married woman included the few household utensils given to her by her family, on the

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1. For the arguments against, and in favour of the adoption of community property in English matrimonial property law see the Report of the Royal Commission on Marriage and Divorce 1956, Cmd. 9678; members of the Commission were unable to reach agreement on whether it would be desirable to introduce into English and Scots law community of property between husband and wife. Twelve members considered it undesirable to introduce community of property, even as a limited measure confined to the matrimonial home or to the furniture. Seven members were of the view that the concept has much to commend it, as an effective and practical expression of partnership in marriage, but differed as to the extent to which the system should be adopted. Of the seven, three members would confine it to the matrimonial home and the furniture, and one to the furniture alone; see further O Kahn-Freund, 'Matrimonial Property: Some Recent Developments' 22 M.L.R. 1959, pp. 241-272.

occasion of her marriage; her personal jewellery and ornaments, and her own farm products, such as yam-seeds, etc. There is evidence that generally a woman always had full capacity to own such property before marriage. After marriage, separate ownership was retained, whether the property was taken to her husband's home, or not. As long ago as the early eighteenth century, Bosman, with reference to the whole of the West African Coast, noted:

> Married people here have no community of goods; but each has his or her own property.[1]

Similarly, Mary Kingsley, who travelled widely in West Africa during the latter part of the nineteenth century says emphatically:

> Betwen husband and wife there is no community in goods under native law; each keeps his and her separate estate.[2]

These statements may be compared with that made by Talbot more than a century later and with reference to the whole of Southern Nigeria. He says:

> Among all tribes the wife's property is exclusively under her own control and can never be touched by her husband; she leaves it to whom she likes, usually to her daughters or sons, but sometimes to her own relatives. Since women do the greater part of the trading, they are often wealthier than the male members of the household, especially in ornaments, clothes, flocks and herds.[3]

Among the Ekois, he noted that women's property rights were very strictly guarded by native law, and that 'a man may not even use his wife's or daughter's cooking pot or pan without her permission'.[4] The property rights of women in the whole

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1. Bosman, A New and Accurate Description of the Coast of Guinea, 1705, op. cit., p. 202.

2. Kingsley, West African Studies, op. cit., p. 377.

3. Talbot, Peoples of Southern Nigeria, Vol. III, pp. 455 and 678.

4. Talbot, In the Shadow of the Bush, 1912, p. 98. See also Partridge, Cross River Natives, 1905, p. 255.

of Nigeria and the Cameroons are positively stated by Meek, who seems to have no doubt whatever as to a woman's legal capacity to acquire and enjoy rights and interests in land. He notes that

> A woman may own land in her own right - land which she had acquired before marriage by her own money or by inheritance or gift.[1]

With reference to the Northern tribes of Nigeria, he similarly says:

> Women in general have the same rights of enjoyment and disposal of property as men...[2]

It may be stated, therefore, that a Nigerian woman in the traditional society had the legal capacity to own all types of property, a capacity which was not lost by a contract of marriage. This was the general position, and while it may apply to an entire group, for example, the Yorubas, the principle of female ownership of property, especially of land, was by no means universal. A closer look at the position among the various Nigerian communities is therefore indicated. The position among (i) the Yorubas, (ii) the Igbos, (iii) other communities, will accordingly be examined.

(ii) The Yorubas.

It is an undisputable fact that a Yoruba married woman always had legal capacity to own and dispose of all types of property, including land. In fact, the legal status of a Yoruba married woman was, in this respect, superior to that of the English married woman before 1882. As was previously stated, and will be elaborated later, the latter was absolutely debarred from owning most items of property.

The capacity of a Yoruba woman to own land and other property, is evidenced by the fact that she had an

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1. Meek, Land Tenure and Land Administration in Nigeria and the Cameroons, 1957, p. 186.

2. Meek, The Northern Tribes of Nigeria, op. cit., p. 281.

equal right with her brother to inherit property from her father, and other relatives. Of course, in the context of the traditional society, where a woman transferred residence when she married, and her children became members of her husband's family rather than her own, any established enforceable equality of rights between male and female members of a family would be of limited practical effect. Moreover, where farming is primarily a male activity,[1] and where no alienable individual right is recognized (as none used to be), the female rights would be regarded as less important. However, this is not to deny the existence of the right.

Of the ancient system of land tenure among the Yorubas, Ward Price asserts:

> It was not contrary to customary law to grant land to women, or even children. It was done rarely however. Nearly every woman was married and shared what her husband possessed; but if it happened that a woman, with means to build or to cultivate, was in need of land for the purpose, it could be granted to her on the same terms as if she were a man. If she was a wife her husband could not claim to have any right over the property, but her son or her daughter could inherit some or all of it.[2]

A similar statement about Yoruba wives was made by Punch. He noted that

> Daughters as well as sons inherited farm land. If a person owns many farms they would be divided among his children. The eldest son would take the biggest ... Young children and daughters unable to farm the land, would not take possession of their portions. The elder brother would possess in trust for them. A daughter married to a man from another tribe would inherit, and if the husband took up his abode with the tribe, he would continue in occupation of his wife's land, provided there were no children. In event of children they would inherit the mother's land, but they also would have to reside and be members of the

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1. Yoruba women do not usually engage in farm work, see above, Chapter I, p. 130.

2. Ward Price, Land Tenure in the Yoruba Provinces, 1939, p. 29; see also Ellis, The Yoruba-Speaking Peoples, 1894, op. cit., p. 177; '... the property of a wife is always separate and distinct from that of her husband'.

tribe.[1]

The capacity of the Yoruba married woman to own property has not changed in the modern society,[2] and her right to own land, and other types of property, as well as her right of equality in regard to inheritance rights, have been recognized in various decisions of the Nigerian courts.[3]

In Abike v. Majotegba and Anor.,[4] a case decided in 1974, the respondent sued the first appellant (his wife), and the man with whom she was alleged to have committed adultery, for damages. The action succeeded before the trial Customary Court. The appellant appealed to the High Court. Agbaje, J., held that an action for damages for adultery cannot lie against a wife under customary law. He said:

> The status of a wife under Native Law and Custom is a little removed, if at all, from that of a chattel. This being so, it is evident that the wife under Native Law and Custom cannot have private income or property of her own. In such circumstances one wonders where the money with which she will settle any damages for adultery against her will come from.

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1. Cyril Punch, Land Tenure and Land Inheritance in Yoruba, Appendix V in Ling Roth's Great Benin: Its Customs Art and Horrors, 1903, p. xxiii. Cf. C.W. Rowling, Report on Land Tenure in Ondo Province, Sessional Paper, No.5 of 1952, p. 32; who cites cases from Akoka and Oka (Yoruba) to show that 'Customary law forbids a woman inheriting any real property from either parent or husband', and concludes 'Women do not own land: there is no exception to that rule'.

2. See e.g. Marris, Family and Social Change in an African City, 1961, p.53; 'A wife's profit from her trade is her own and she spends it mostly on her personal needs, her children and in helping her own relatives'; see also N.A. Fadipe, The Sociology of the Yoruba, 1937 (1970) edit. p. 88; Ekundare, Marriage and Divorce Under Yoruba Customary Law, 1969, p.24.

3. See e.g. Johnson and Ors. v. Macaulay and Anor [1961] 1 ALL N.L.R.743; Oshilaja and Anor. v. Oshilaja and Ors.[1972]10 C.C.H.C.J.11; Salako v. Salako and Ors. [1965]L.L.R.136; Taiwo and Anor v. Taiwo and Anor.[1958]3 F.S.C.80; Williams and Anor v. Facade and Anor [1971]2 U.I.L.R.477.

4. [1974] Suit No.AB/5A/74, unreported decision of July 5, 1974, see Nigerian Law Journal, No.9, 1975, p. 154.

The learned Judge cited no authority in support of the proposition that a wife under Yoruba customary law cannot have private property or income of her own. It should be noted that although the Married Women's Property Law which gives full legal capacity to wives of a statutory marriage does not apply to customary marriages in the West, or Mid-Western States, this statute does not change Yoruba customary law. It is respectfully submitted that the learned Judge's view is based on an inadequate knowledge of Yoruba customary law.

(iii) The Igbos.

The property-owning capacity of Igbo women cannot be stated with precision. The customary law in this respect seems to range from one extreme to another, in different Igbo sub-groups. The most positive statement of the property rights of Igbo women comes from Meek. He says of a wife among the Igbos.

> If she brings with her from her own home a supply of seed-yams, the product of those seed-yams is her own, and if she leaves her husband she can take her yams with her. Goats dogs and fowls brought from her own home remain her own property. Any money she makes by her own efforts (e.g. by trading or selling part of her farm produce) belongs to her entirely. Many wives in fact are richer than their husbands, and cases occur of wives supporting the husbands instead of husbands supporting the wives. In former days many women owned slaves; and rich mothers, instead of fathers might provide their sons with wives.[1]

It is appropriate to note here that the contribution of Igbo women, noted in the above passage by Meek, has not changed in modern society. More and more Igbo women are providing, not perhaps wives, but, more importantly, education

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1. C.K. Meek, Law and Authority in a Nigerian Tribe, op. cit., pp. 202-203. Cf. Basden, Among the Ibos of Nigeria, 1921, op. cit., p. 93; 'The only possession that can really be labelled as the property of a wife are her waterpot, market basket and calabash, together with her cooking utensils, and all the vegetable called koko (edde).'

for their sons - and for their daughters too - instead of their husbands doing so. The Rt. Hon. Dr. Nnamdi Azikiwe, the former President of Nigeria, and Owelle of Onitsha, recently reminded the people of this fact, when writing on the crisis occasioned by the recent controversy between the Onitsha community and the former Administrator of the former East Central State, over the ownership of, and the allotment of stalls in, the Onitsha market. The dedication of Zik's book on the crisis was as follows:

> 'Dedicated'
> to our Mothers, Wives, Sisters and Daughters, whose maternal instinct and inherent diligence enabled them to utilise markets to husband their resources and educate their brood who, ironically, allow their talent and power to be used to deprive Onitsha womanhood of this ingredient of cultural identity.[1]

Meek's statement of the capacity of Igbo women, married or unmarried, to own property, is supported by Nwabueze, who says of the Igbo woman:

> She occupies a very inferior position in the social structure. This does not, however, reflect on her capacity to hold land outside the context of community or family land. She is perfectly competent to acquire land in her personal capacity by purchase, gift, pledge or otherwise.[2]

Similarly, Obi states:

> Before marriage, a woman can purchase land in her own name. She can also take a lease of a plot at a rent, take a pledge or have a piece of land "shown to her" ... A married woman can own land personally, and this in her husband's life-time. This is a common phenomenon among elderly women with grown-up children and among younger but childless wives ... whoever actually makes use of the land, ownership is in the woman who purchased it or obtained it on

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1. Nnandi Azikiwe, Onitsha Market Crisis, (Nsukka, Nigeria, Zik Enterprises Ltd. 1976).

2. Nwabueze, Nigerian Land Law, op. cit., p. 171.

pledge, lease, etc.[1]

Statements to the same effect are made of the property-owning rights of Igbo wives, by other writers.[2]

There are, however, some Igbo communities where it is alleged, that women were not allowed to hold land. For example, Green, writing about women in the small Igbo village of Umueke Abgaja, asserts positively:

> Women do not own land. The village is an exogamous unit and a woman after marriage lives in her husband's village.[3]

The meaning of this statement is not quite clear. Obi interprets it to mean that women have no legal capacity to own land,[4] but the writer may have merely stated a positive fact - that women in Abgaja did not in fact own land, in which case, women's incapacity to own land cannot be deduced from her statement. The statement, therefore, cannot be taken as an authority on the legal incapacity of Igbo women generally, or of Abaja women in particular, to own land.

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1. Obi, The Ibo Law of Property, op. cit., pp. 70-71; Obi, Modern Family Law, op. cit., p. 257; 'a married woman has legal capacity to acquire, own and dispose of property in her own right and in her own name, under customary law'. Cf. Gloria Anyaegbunam, Sociology of an Ibo Village Group: A Case Study of Ogidi Town, B.S.C. dissertation, University of Nigeria, p.40, 'if a woman wants to acquire land she does this through her husband or her children and when she dies such land is owned by her husband if he is alive or jointly by her sons; Aniagolu, 'Aspects of Customary Marriage', op. cit., p. 115.

2. See e.g. Esenwa, 'Marriage Customs in Asaba Division', op. cit., p. 73; Meek, Land Law and Custom in the Colonies, op. cit., p.159 ; Uchendu, 'Concubines Among Ngwa Igbo', op. cit., pp. 187-188.

3. Green, Land Tenure in an Ibo Village, op. cit., p. 7; Green, Igbo Village Affairs, op. cit., p. 34; see also Thomas, Anthropological Report on the Ibo-Speaking Peoples, op. cit., Part IV, pp. 136-140.

4. See e.g. Obi, The Ibo Law of Property, op. cit., p. 69; Elias, Nigerian Land Law, 1971, p. 133.

A clearer statement of the incapacity of Igbo women to own land is contained in the Customary Law Manual of Anambra and Imo States, published in 1977. Referring to the right to own freehold land, the Manual states:

> (1) Any adult male has a right to own freehold land.
> Local variations - In Abakaliki and Izzi Divisions individuals do not own freehold land.
>
> (2) Married women (whether living with their husbands or separated from them) and widows do not own freehold land.
> Local variations - Such women may own freehold land in Aba, Afikpo, Arochukwu, Bende, Idemili, Njikoka, Nkwere, Nnewi and Northern Ngwa Divisions, Nsukka Division excluding Nsukka Town where the general rule applies) Ohaffia, Onitsha, Orlu, Oru and Owerri Divisions.[1]

The Manual lists a total of thirty-nine Divisions as existing in the two States. It seems, therefore, that in at least twenty-five Divisions, married women were not allowed to own land. In twenty Divisions, an unmarried adult woman was similarly incapable of owning land.[2]

The Manual further states in section 322:

> (1) Where a woman acquires moveable property while she is married, such property belongs to her exclusively, but like her own person, is subject to the overall control of her husband...
>
> (2) Where a woman acquires immovable property, (land, buildings and economic trees) while she is married, such property belong [sic] to her exclusively but, once again are [sic] subject to the overall control of her husband. Moreover, the wife has no right to dispose of such property in any way whatever without the prior consent of the husband.
>
> (3) A married woman must first obtain her husband's consent before she can give away any property she acquired during marriage (movable or immovable) to any person other than her child either in her life-time or by will.

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1. The Customary Law Manual, 1977, p.8.

2. Ibid., p. 8.

Section 323 of the Manual provides:

> Property, whether movable or immovable, acquired by a married man does not become the common property of himself and his wife or wives. A married man does not require the consent of his wife or wives before he can dispose of any property movable or immovable which he acquired while married. It makes no difference that he acquired such property with the help of his wife or wives.

There are no local variations to the laws as stated in sections 322, and 323. These laws, therefore, apply to all communities in Anambra and Imo States, and affect millions of women in these two States. The laws stated in the Manual purports to be 'current well-established customary laws as ascertained in the course of field research carried out over a period of five years', by a team of law officers appointed by the Government of the then East Central State.

Customary law in Nigeria is treated in the Superior Courts as a matter of evidence, and section 58 of the Evidence Act provides:

> In deciding questions of native law and custom ... any book or manuscript recognized by natives as a legal authority [is] relevant.[1]

The fact that the laws contained in the Manual purport to be the laws accepted and recognized by the various communities as binding on them, coupled with the fact that the work was prepared under a Government directive, give the Manual sufficient status to be regarded by judges, both in Customary Courts and in the Superior Courts, as an authority on Igbo

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1. Evidence Act, 1945, Cap 62, Laws of the Federation of Nigeria, 1958. See Adedibu v. Adewoyin [1951]13 W.A.C.A. 191; West African Court of Appeal held that Mr. Ward Price's Memorandum of Land Tenure in the Yoruba Provinces, a detailed study by a former administrative officer was not of sufficient eminence to warrant its citation to the court as an authority. Cf. Suberu v. Sunmonu [1957] 2 F.S.C.33.

Customary law.[1] The above provisions in the Manual are, therefore, important, and call for comment.

Before discussing the validity of the substantive provisions set out above, it may be pertinent to point out two relevant facts relating to the procedure adopted for the ascertainment of the laws stated in the Manual.

Thirty-nine Divisional Law Panels, comprising natural rulers, Administrative Officers, community leaders, barristers practising in their Divisions, former members and presidents of Customary Courts, and other persons, etc. (whether literate or not), were set up. Questionnaires calling for information on the law relating to the subjects covered by the Manual were distributed to the Law Panels. The Panels consulted members of the communities, and in most cases they submitted written answers to the questionnaires. These written answers were tested and recorded in subsequent recording sessions by the Law Panels, under the Chairmanship and guidance of the Commissioner for Law Revision and his Law Officers.

(a) Of the 463 members of the 39 Divisional Law Panels, which were set up in the various Divisions, only two members, one in Aba Division, and the other in Abakaliki Division, were women.[2] All other members of the Panels were men. One wonders why where was such a poor representation of women on the Law Panels in communities where a relatively large percentage of the women are educated. The poor female representation does not inspire confidence in the impartiality of the laws stated.

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1. See Adeseye v. Taiwo [1956] 1 F.S.C.84; Suberu v. Sunmonu [1957] 2 F.S.C.33; Oyekan v. Adele [1957] 1 W.L.R.876 at 882, where books written by individuals were relied on by the Courts, although the books had not been put in evidence; cf. Adedibu v. Adewoyin [1951] 13 W.A.C.A.191.

2. See The Customary Law Manual, op. cit., Schedule I, pp. 374-385 for a list of the members of the Divisional Law Panels, and Recording Sessions held.

(b) Of the 104 persons personally interviewed by the present writer in Onitsha, only two of them had any knowledge of the work undertaken by the Commissioner for Law Revision and his team. Both persons who knew about the project had been members of the Law Panel in Onitsha Division. In Nsukka, none of the interviewees had heard of the project either. Individuals from other Divisions who were asked about the project were similarly ignorant. One wonders how many members of the various communities were actually consulted.

With particular reference to the laws relating to the legal capacity of married women to own land or other property, as stated in the Manual, and as set out above, the following observations should be noted:

(a) It is doubtful whether any community or State has the legal authority to deprive a sane adult Nigerian woman of her capacity to own land, or any other kind of property, to the same extent as a man can, in view of the 'Fundamental Rights' provision of the Nigerian Federal Constitution 1979, which prohibits discrimination on the ground of sex.[1] The Constitution has the force of law throughout Nigeria, and where any other law is inconsistent with its provisions, the Constitution prevails and that other law is to the extent of the inconsistency void. Any customary law which incapacitates women, but not men, from owning property is consequently void.[2]

(b) The statement of the laws in the Manual which deprives a married woman of the right to own property, movable or immovable, and of her right to dispose of such property without her husband's consent, is misleading in that it takes no account of the Married Women's Property Act, 1882. The customary law, in this respect, is incompatible with the provisions of the Married Women's Property Act

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1. Constitution of the Federal Republic of Nigeria (Enactment) Decree 1978, S.39(a).

2. Ibid., Ss. 1(1) and 1(3).

1882, which is a statute of general application in Anambra and Imo States. The provisions of the Manual as such are not enforceable by the courts.[1]

(c) Similarly, the customary law as stated in the Manual, which purports to deprive married women of testamentary capacity to dispose of their individual property, is incompatible with section 3 of the Wills Act, 1837, a statute of general application in the two States.[2]

(d) If the customary laws as propounded in the Manual were enforced, it would result in great injustice to women, and defeat the expectations of many men. For example, in all Igbo communities, daughters are generally given no inheritance rights in their fathers' intestate estates.[3] Many fathers defeat this principle of customary law by making wills providing for their daughters. Such provisions may be in the form of land, houses, money or other forms of property. A father's intention would be defeated, if his married daughter has no capacity to own the property he has devised to her, or her disposal of such property is subject to the consent of her husband.

(e) Finally, and perhaps most important, the laws as stated in the Manual are contrary to the actual practice of the people. It is doubtful whether any Igbo community today prevents women from owning land. This certainly is not the practice in Onitsha. There are numerous cases of married women owning lands and houses in Onitsha. Informants denied that such a law ever existed there. It was admitted

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1. See further above, Chapter II, pp.182-183; for the development of this argument see below, p. 371 et al.

2. See further below, Chapter XIII, the provisions of the Wills Act in this respect is amended by the Married Women's Property Act, 1882.

3. But see Esenwa, op. cit., p. 81, who notes that among the Igbos of the Asaba District, the law has now changed and 'Nowadays, owing to our contact with the white man, all children have equal claims to their father's property, and where he dies intestate legal steps are always taken to see that each of the children has his or her due share'.

that women do not inherit land from their fathers, but there never was, nor is there now any customary law which prevents them from purchasing land. In Nsukka, informants stated categorically that a married woman can own all types of property,[1] and can dispose of it without their husband's consents.

The law as stated by Obi, Nwabueze, and other writers to the effect that Igbo women have full legal capacity to acquire, and dispose of property without restraint, provided they were sole owners of the property, correctly represents the current customary law among the Igbos.

(iv) Other communities.

In many of the other communities, women had legal capacity to own all types of property. The property rights of Hausa women are stated by Palmer:

> No native woman is by custom in manu of her husband. She inherits, acquires, and disposes of property as a femme sole.[2]

Among the Edos, the position is a little less precise. Among the Edos of Benin, a woman's property is said to include cattle, trees, and slaves, as well as household utensils.[3] The right of a Benin wife to own property was stated by Dapper in the early seventeenth century. He asserts:

> The husband takes all the property which his wife has left, for himself, without leaving to the children anything, but what their mother had given them during her life-time.

This statement shows that the wife in Benin customary law had legal capacity to own property, and to dispose of it, at least to her children, during her life-time. It is not

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1. The present writer was allowed to purchase land according to the customary law, of Nsukka.
2. See African (West) CO 879, No. 906, Memoranda on Land Tenure and Land Revenue Assessment in Northern Nigeria, by Sir Percy Girouard, Colonial Office, May 1908, App. IV, para. 6.
3. Roth, Great Benin, op. cit., Chapter IX, p. 97.

certain whether the right of the Edo-speaking woman to own property extended to the ownership of lands. Of the Northern Edos, Bradbury states:

> Women have no rights in land, but may obtain plantations by purchase, gift, or by paying labour to plant and work them.

It is not clear what the writer means by this inconsistent statement, but he admits that the 'information concerning rights to land among the Etsaka [Northern Edo] is somewhat confused'.[1]

Among the Ibibios, it was stated that women had no rights under customary law to own land in Eket,[2] but such a law is no longer operative there, since the present writer was shown lands and houses belonging to women, and the Customary Court cases examined in the Eket Customary Court files recognized the legal capacity of women to own land, although they may not inherit land from their fathers. The Efik Ibibio women, however, like the Yorubas, have always had full legal capacity to own all types of property,[3] and indeed, like the Yorubas, also inherit property from their fathers. Marriage has no effect on their property rights. Many cases were recorded in the Calabar Customary Court involving claims by women to the ownership of land.

In some communities, even movable property of a married woman under the traditional customary law belonged legally to her husband. This was the position among the Idomas as described by Armstrong. He states the position thus:

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1. Bradbury and Lloyd, The Benin Kingdom, op. cit., p. 107.

2. Information gleaned from interviewees in Eket.

3. When Mary Slessor wanted land to erect a Mission house, she could not acquire land, according to the law of Calabar since she was a European, but she was able to acquire it in the name of "Jean and the other girls" (her domestics and helpers) and then to give the Mission a perpetual interest in it, see Livingstone, Mary Slessor of Calabar, 1918, op. cit., p. 223. The land and the houses she built in Calabar are still owned by the Mission.

> The property which a married woman acquires does not belong to her but to her husband ... Since women in Idoma, as in many parts of West Africa are enthusiastic traders, they amass considerable property during their married life. This may be in the form of money, clothing, and even houses built to be rented. All property acquired by a wife as a result of successful trading is regarded as belonging to the husband, and when he dies it becomes part of his estate, to be divided equally among his sons, or amongst his brothers if he has no sons.[1]

Summary:

A review of the existing literature on the property rights of Nigerian women married according to customary law reveals an inconsistent pattern. Whilst among most communities, for example the Yoruba, a clear doctrine of separate marital property existed, among quite a few other groups, the principle of unity of title was practised, and this involved absolute ownership by the husband of all his wife's property, movable and immovable. Community of property, which is found in some parts of Southern Africa,[2] seems to be unknown among Nigerian communities.

Summing up the position, it may therefore be stated that under traditional customary laws in Nigeria:

(a) most Nigerian married women had legal capacity to own movable property;

(b) the majority of married women could also have owned land and other immovable property;

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1. R.G. Armstrong, 'Intestate Succession Among the Idoma', in Studies in the Laws of Succession in Nigeria, edited by J. Duncan M. Derrett, 1965, p. 224-225; See also Alvin Magid, Men in the Middle: Leadership and Role Conflict in a Nigerian Society (Manchester: Manchester University Press, 1976), p. 33. Cf. the Ghanian case of Quartey v. Martey [1959] G.L.R.377 where it was held that, 'by customary law it is the duty of a man's wife and children to assist him in the carrying out of his duties of his station in life. The proceeds of that joint effort, and any property which the man acquires with such proceeds, are by Customary law the individual property of the man, not the joint property of all'. Contrast the recent Ghanian case of Abrebesh v. Karr and Ors [1976] 2 G.L.R.46.

2. See H.J. Simons, African Women: Their Legal Status in South Africa, 1968, pp. 168-172.

(c) in some communities married women were debarred from owning land;

(d) in a few communities, all property, movable and immovable acquired by a married woman legally belonged to her husband.

(v) The effect of the Married Women's Property Acts, 1882-1893.

The position of a wife married according to customary law in regard to the ownership and disposal of property has been revolutionized by the reception of English law. As previously stated, before 1870[1], the position of the English wife under the Common law was little better than the position of the Idoma wife as stated above.[2] The 'doctrine of unity' operated to place most items of the wife's property in the legal ownership of her husband.

The common law position was changed by the enactment of a series of statutes which effectively deprived the English husband of his stranglehold on his wife's property. The Married Women's Property Act 1882, the most important Act of the series provides:

> A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding,and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a femme sole, without the intervention of any trustee.[3]

Similarly section 2 of the Act expressly provides:

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1. The Married Women's Property Act 1870 provided a number of exceptions to the common law rule, e.g. it provided that specified types of property acquired by the wife, such as her earnings, stocks and shares, money in the bank, etc. should be deemed to be held for her separate use. The Act was repealed by the Married Women's Property Act 1882.

2. See below, p. 369.

3. Section 1(1) Married Women's Property Act 1882.

> Every married woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carried on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

The effect of these sections was to free married women from all incapacities in relation to the holding and disposal of property to which they were subjected under the common law.

The Married Women's Property Acts satisfy the criteria of statutes received into Nigeria, as previously noted,[1] under the general reception of English law. The Act of 1882 has been applied in many cases[2] in Nigeria. These cases, however, all involved statutory marriages, and it seems to be taken for granted by legal practitioners in advising their clients, and indeed by legal writers, that the Married Women's Property Acts only affect the wives of a statutory marriage. Thus one learned writer on property law states:

> The English Married Women's Property Act, 1882, as amended in 1894 and 1893, is a statute of general application in force in England on the relevant date and therefore applied in Nigeria to women married under the Nigerian Marriage Acts, until its application was prohibited or varied by local legislation.[3]

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1. See above, Chapter II, p. 195.

2. See e.g. Ogedegbe v. Ogedegbe [1964] LL.R.209; Egunjobi v. Egunjobi [1974]4 E.C.S.L.R.; Asomugha v. Asomugha [1972]12 C.C.H.C.J.91.

3. See O.R. Marshall, 'A Critique of the Property Legislation of Western Nigeria', Nigerian Law Journal, Vol.1, No.2, December 1965, pp. 151-172 at p. 162; see also Park, Sources of Nigerian Law, op. cit., pp. 33 and 51; Obi, Modern Family Law, op. cit., pp. 260 and 266-267.

The writer was referring to the former Western Region where the English Married Women's Property Acts were replaced by a local statute, the Married Women's Property Law, 1958, which substantially re-enacted the provisions of the Married Women's Property Act, 1882.

It is respectfully submitted that there is no justification for limiting the application of the Married Women's Property Act, 1882, to women married under the Nigerian Marriage Acts. The Statute applies to all wives of a statutory marriage, whether they were married under the Nigerian Marriage Act or not. The property rights of women married according to customary or Islamic laws are governed by the provisions of customary or Islamic law respectively. In so far, however, as these provisions of customary or Islamic law are incompatible, either directly or indirectly, or by implication, with the Married Women's Property Acts, such provisions are not enforceable by Nigerian Courts. This is due to the fact that customary law (including Islamic law) only applies in Nigeria in so far as it is 'not repugnant to natural justice, equity and good conscience or incompatible with any law for the time being in force'.[1] 'Any law' includes a statute of general application.

In the recent case of Adesubokan v. Yunusa,[2] a Moslem from Kwara State died leaving property in Zaria, and in Lagos. He purported to make a will under the Wills Act, 1837, a statute of general application in the Northern States. This will offended Islamic law in that it deprived his heirs according to Islamic law, of the shares to which they were entitled under the Maliki Islamic law operative in the Northern States. The trial Judge, Bello, J., held that a Moslem of the Northern State of Nigeria is entitled to make a will under the Wills Act, 1837, but that he had no right to deprive by that will any of his heirs who were

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1. See above, Chapter II, pp. 182 et al.
2. [1973] 3 U.I.L.R.22.

entitled to share his estate under Islamic law. The Wills Act does not restrict a person's power of testation while Moslem law does. On appeal to the Supreme Court, it was held that the Islamic law, which favours equal distribution of property, despite the existence of a valid will, violates section 3 of the Wills Act, 1837, under which a testator can dispose of his property as he pleases. The Supreme Court stated that section 34(1) of the Northern States High Court enjoins the High Court to observe and enforce the observance of every native law and custom which is not incompatible either directly, or by implication with the Wills Act 1837, and that the Islamic law which the trial Judge applied in the case was incompatible with the Wills Act, since the definition of native law and custom in Northern Nigeria includes Islamic law.

It is submitted that, in so far as the customary laws of any State, except Oyo, Ogun, Ondo, and Bendel States,[1] deprive married women of the capacity to acquire, or hold separate property, or to dispose by will or otherwise of such property, or which provide that such property, ante-nuptial or post-nuptial, shall belong to, or be controlled by her husband or anyone else, are incompatible with sections 1 and 2 of the Married Women's Property Act, 1882, and are consequently unenforceable.[2]

The Married Women's Property Acts do not apply in Oyo, Ogun, Ondo, and Bendel States. The Married Women's Property Law, 1958, originally enacted in the Western Region but which now applies to these four States provides:

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1. Since 1972, the Lagos State (Applicable Laws) Amendment Edict, No.11 of 1972, makes applicable within Lagos State, the Wills Law, 1959, W.R.L.N. 1959, Cap. 133 of the former Western Region of Nigeria. The Lagos State has not, however, adopted the Married Women's Property Law, 1958 of the former Western Region. The Married Women's Property Act, 1882 therefore applies in Lagos State.

2. See further, below, p. 377.

> Nothing in this Law shall affect the capacity, property or liabilities of any persons married solely in accordance with the requirements of customary law.[1]

Women married according to customary law, including Islamic law only, in these four States are therefore unaffected by the Married Women's Property Law, 1958, nor are they affected by the (English) Married Women's Property Act, 1882. Their capacity to acquire, hold and dispose of property depends entirely on customary law. But it has been seen that Yoruba customary law recognizes the right of a married woman to own separate property. The customary laws of most of the other communities in those four States also allow women to own separate property. The position is, therefore, that the large majority of women married according to customary law have full proprietary capacity.

C. Islamic Law Marriage

Under Islamic law, there is a complete separation of property of husband and wife.

According to classical Islamic law theory, a Moslem wife is entitled to her separate property during the marriage. All the property given to her by her parents, or other relatives, which she takes to her husband's home, remains in law her absolute property, over which she has full control and free disposal. Her husband has no right to dispose of any of her property, including her mahr (dower) without her consent.[2] No distinction is made between the two kinds of property. The same rule applies to movable and

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1. Cap 76, Laws of the Western Region of Nigeria, 1959 Revision, S.1(2); see also Cap 98, Laws of Bendel State, 1976, S.1(2).

2. See Shiekh M.H. Kidwai, Woman: Under Different Social and Religious Laws (Buddhism, Judaism, Christianity, Islam), 1976, p.151. See also J.A. Ibrahim, 'The Muslims in Malaysia and Singapore: The Law of Matrimonial Property', in Family Law in Asia and Africa, edit. by J.N.D. Anderson, 1968, p.182; Abdur Rahman, Institutes of Mussalman Law, op. cit., p. 114, art. 206.

immovable property,[1] however acquired.

The Maliki school of Islamic law, however, which as previously noted operates in Northern Nigeria, prevents a married woman from giving away gratuitously, more than one-third of her property, without the consent of her husband.[2] It may be said, therefore, that a Moslem wife in the Northern States, legally owns only one-third of the property she possesses, since her power of alienation of the remaining two-thirds is restricted by law.

There is evidence, however, that as far as movables are concerned, Moslem husbands do not ordinarily interfere with their wives' attempts to dispose of their property, and most wives enjoy full ownership of their personal property such as money, clothes, jewels, household utensils, etc.[3] As far as land is concerned, there is an open divergence among Moslem communities, between the concept of Islamic law, and the actual practice observed.[4] Most Moslem groups observe customary law in relation to land, rather than Islamic law, and this results in women being deprived of land ownership in many cases. This aspect will

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1. See Mulla, Principles of Mohamedan Law (India, Tripathi Ltd., 17th edition, 1972), par. 51.

2. 'Property (mal) in Islamic law is anything which a Muslim can legally own, whether a corpus or usufruct. In the eyes of the Sharia there are certain things which are not considered as property because they are unlawful to Muslims, for example, khinzir, i.e. swine flesh, wine, musical instruments, etc., see Muhammad Yahaya, 'The Legal Status of Muslim Women', op. cit., p. 1, at p. 16.

3. See Muhammad Yahaya, 'The Legal Status of Muslim Women in the Northern States of Nigeria', Journal of the Centre of Islamic Legal Studies, Vol. 1, No.20, p. 1. at p. 17.

4. See Charles Henry Robinson, Hausaland, or Fifteen Hundred Miles through the Central Soudan, 1896, p. 206.

be dealt with further in the next chapter which deals with inheritance.

The capacity of the Moslem wife to acquire, hold and dispose of property is, as under customary law, now affected by the Married Women's Property Acts, 1882-1893, which are also statutes of general application in the Northern States. A married woman has full capacity to acquire, control and dispose of all items of property without interference by her husband, and the restraint imposed by Maliki law on her legal capacity to dispose of any part of her property is not legally enforceable.[1]

D. Statutory marriage

Under the English common law a husband gained seisin of all freehold, and in most cases, copyhold lands, which his wife held at the time of the marriage, or acquired during coverture, and was entitled to the rents and profits derived from them. The wife had no power to dispose of her realty during the marriage. All the wife's other property, whenever acquired, also belonged to the husband, and he had absolute power to dispose of them inter vivos. In the case of pure personalty, he could also dispose of them by will. The only exception to this rule applied to the wife's clothing and personal ornament suitable to her rank.[2] The wife could not dispose of her personal clothing and jewellery during the marriage, but the husband could dispose of them during his life-time, although he could not deprive her of them by bequest, and on his death they became her property and did not form a part of his estate.[3]

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1. See further, below, p. 377.
2. Her so-called 'paraphernalia'.
3. See Bromley, Family Law, 1976, p. 429-434; for fuller accounts, see Blackstone, Commentaries on the Laws of England Book I, Chapter 15; Albert Venn Dicey, Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century, 2nd edit. (London: Macmillan and Co. Ltd., 1962), p. 371-398.

The common law position was drastically changed by the Married Women's Property Acts 1870-1893. The Married Women's Property Act 1882, provides that any woman marrying after 1882, should be entitled to retain all property owned by her at the time of the marriage as her separate property and that, whenever she was married, any property acquired by a married woman after 1882, should be held by her in the same way. It also enacted that

> A married woman shall ... be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

Since 1870, therefore, the basic principle of English law is that marriage has no effect on the spouses property rights: in the words of Viscount Dilhorne in Gissing v. Gissing,[1] 'There is not one law of property applicable where disputes as to property is between spouses or former spouses and another law of property where the dispute is between others'.

The Married Women's Property Acts 1870-1893, as previously noted, qualify to be received into Nigeria under the general reception of English law,[2] and have been applied in a few cases involving a statutory marriage.[3] In the West and Mid-Western States, the relevant Act is the Married Women's Property Law, 1958.[4] In Egunjobi v. Egunjobi,[5] Agbaje, J., stated that the Married Women's Property Law of the Western State 'is an exact reproduction of the Married Women's Property Act, 1882'.

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1. [1971] A.C.886 at p. 889.

2. See above, Chapter I.

3. See Egunjobi v. Egunjobi [1974] 4 E.C.S.L.R.552; [1964] L.L.R.209. Asomugha v. Asomugha [1972]12 C.C.H.C.J.91; but see the discussion below, p.

4. Cap, 76, Laws of the Western Region of Nigeria, 1959 Revision.

5. [1974] 4 E.C.S.L.R.552.

It has already been submitted that except for the Western and Mid-Western States, the Married Women's Property Acts apply to all married women regardless of the type of marriage.[1] From the foregoing the general statement may be made that the matrimonial property regime which operates in the whole of Nigeria, with a few possible exceptions in the Mid-Western States is the 'separate property' system.

E. A conflict of laws

(i) Introduction

The conflict of laws produced by the existence in Nigeria of three different, and often conflicting systems of marriage laws, has been previously noted. One such conflict was noted in connection with the monogamy provision of the Marriage Act which conflicts with the provisions of customary and Islamic laws under which a man may practise polygamy.[2] Another conflict, which will be discussed in the next chapter, and which is of vital importance to the legal status of Nigerian women, concerns the inheritance rights of a widow in the estate of her deceased husband who dies intestate.[3] Both of these conflict of laws problems have received the attention of the Nigerian courts to some extent. A conflict of laws which has not apparently been the subject of much judicial, nor indeed of academic comment, revolves around the applicability in Nigeria of the Married Women's Property Act, 1882.[4]

The issue is of vital importance to women's status in view of the superior property rights the statute gives to

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1. See further, below, pp. 363-369.

2. See above, Chapter X.

3. See below, Chapter XIII.

4. 45 and 46 Vict., C.75.

married women, compared with those given under Islamic law, and some systems of Nigerian customary law. Several questions arise: is the statute applicable in Nigeria; is it applicable only to spouses of a statutory marriage, or does it also apply to spouses of a customary or Islamic law marriage; is the whole statute applicable, or is the application in Nigeria limited to certain sections?

(ii) The application of the Act in Nigeria

The vital question here is whether the Married Women's Property Act, 1882, is a statute of general application in Nigeria. This depends on whether the statute was

(a) a statute of general application in England;

(b) in force in England on the first day of January, 1900.[1]

There seems little doubt that the statute satisfies the above criteria.[2] In addition, however, the statute can be in force in Nigeria so far only as the limits of the local jurisdiction and local circumstances permit.[3] By this provision not every Act which is of general application in England is automatically in force in Nigeria. Brett, F.J. has expressed the principle as follows:

> The court would be free to hold that local circumstances do not permit a statute to be in force if it produced results which were manifestly unreasonable or contrary to the intention of the statute.[4]

As to whether the Married Women's Property Act, 1882 satisfies this latter criterion, it is pertinent to note that the same learned Judge pointed out that the widespread

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1. High Court Law, Cap. 49, Laws of Northern Region of Nigeria, 1963 Revision, S. 28 ; there is a similar provision in the other High Court Laws, see above, Chapter II, p. 195.

2. See Park, Sources of Nigerian Law, op. cit., pp. 18-36.

3. High Court Law, Cap 49, Laws of the Northern Region of Nigeria, 1963, Revision, S. 28.

4. Lawal v. Younan [1961] 1 ALL N.L.R. 245 at p. 257.

existence of polygamy in Nigeria would raise the issue most acutely if the Married Women's Property Act, 1882, ever fell to be considered.[1] Indeed Park,[2] in his excellent book, The Sources of Nigerian Law, lends some support to the dicta of Brett, L.J. In discussing the application in Western Nigeria of the English Married Women's Property Act, 1882, he says:

> Before 1959, though the point was never expressly decided in a court, that Act was probably in force in the Region as being a statute of general application in England on January 1, 1900. It was, of course, quite inappropriate to many Nigerian situations, particularly polygamous marriages, but under the rules as to internal conflict of laws the Act would have no effect in relation to such marriages, and therefore was probably not excluded on the grounds that local circumstances would not permit its being in force ... simply to enact the terms of the English Act would have had disastrous effects, for it would have resulted in its rules applying to all marriages in the Region, whether monogamous or not.

It is difficult to appreciate what the writer means when he states that the Act is 'inappropriate to many Nigerian situations, particularly polygamous marriages'. There seems to be no logical reason why the Act should be more appropriate to a monogamous marriage than to a polygamous marriage, since the most important provision of the Act is securing to a married woman the capacity to acquire, hold and dispose of her separate property in the same manner as if she were a feme sole — a capacity already possessed by most Nigerian women who are married polygamously under customary law. It

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1. Ibid.,

2. Park, Sources of Nigerian Law, op. cit., p. 51; see also p. 33. 'If the Act was held to be in force in the jurisdiction, the rules of internal conflicts would operate in such a way that it would only apply to women married monogamously under the Marriage Act (Cap 115), and perhaps not to all of them. It would certainly not apply to women who had contracted polygamous marriages under customary law.

has been seen that most Nigerian married women have full capacity under customary law to acquire, hold and dispose freely of, separate property without intervention from their husbands.[1] Yoruba married women, especially, have the same rights in this respect as unmarried Yoruba women. Consequently, the application of the Married Women's Property Act, 1882, in the former Western Region of Nigeria would have resulted in no significant changes, at least as far as Yoruba women are concerned.[2]

Although admittedly, the application of the Statute would result in a change of the customary law in the few communities which deprive married women of full property rights, the change cannot be regarded as 'a disastrous effect' or manifestly unreasonable so as to oust the application of the Act under the reception provision.

It is submitted that the Act satisfies the criteria of the reception provision, and as such is a statute of general application in those States which have not ousted its application by local legislation.[3] Indeed, the courts have by implication recognized the application of the Act, and in many decisions have declared a married woman capable of suing, or of 'being sued either in contract or in tort or otherwise, in all respects as if she were a feme sole',[4]

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1. See above, pp347-363.
2. Cf. the position in Akan customary law, see A.N. Allott, "The Effect of Marriage on Property in the Gold Coast", 5 Int. and Comp. Law Quarterly, 1956, pp. 519-533 at p.532.
3. See above, pp. 366-367.
4. This is implicit in the fact that all married women, irrespective of type of marriage contracted are permitted to sue and be sued in contract and in tort in the Superior Courts of Nigeria; cf. the Ghanian case of Abbapesiwa v. Krakue [1943]9 W.A.C.A.,161 where the West African Court of Appeal held that under the Married Women's Property Ordinance, 1890, Cap.131, Laws of Ghana, 1951 Revision, an Ordinance based on the English Married Women's Property Act, 1882, a husband and wife are legally capable of being partners in a business, and that a woman can trade separately from her husband.

in relation to third parties and her separate property. In not one of the numerous cases in contract or in tort brought by or against married women in the Superior Courts of Nigeria has the capacity of the woman to sue or be sued been in any doubt.

(iii) Is the Act applicable to married women subject to customary law?

The consensus of opinion seems to be that the Married Women's Property Act, 1882, applies to wives of a statutory marriage even in cases where such wives are subject to customary law. The view of Park in this respect has already been noted. Similarly, Obi asserts:

> A married woman's 'English' law capacity to acquire property and to possess property of her own is governed by statute law, once more the Married Women's Property Act, 1893.[1] By section 3 of this Act, as re-enacted by the Western Regional Parliament: '... a married woman shall (a) be capable of acquiring, holding and disposing of any property ... in all respects as if she were a feme sole.'[1]

The writer confines the application of the Act to spouses of a statutory marriage but gives no reason for so doing. The cases in which the Married Women's Property Act 1882 has been applied in Nigeria have similarly failed to justify its application. In Ogedegbe v. Ogedegbe,[2] the respondent opposed his wife's application for possession of the matrimonial home on the ground that the Married Women's Property Act 1882 did not apply, and that the procedure laid down in the Sheriffs and Civil Process Judgments (Enforcement) Rules should have been followed. Adedipe, J., rejected this contention. After reviewing several authorities where similar applications under section 17 of the Married Women's Property Act, 1882 had been entertained by the English courts, the learned Judge said:

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1. Obi, Modern Family Law, op. cit., p. 258; see also Kasunmu and Salacuse, Nigerian Family Law, op. cit., p. 201.

2. [1964] L.L.R.209.

> I hold that this application was properly brought under section 17 of the Married Women's Property Act, 1882, and that the applicant is entitled to occupy four rooms in the new house built by the respondent at No. 36 Aje Street, Yaba.[1]

The learned Judge did not address his mind as to whether the Act applied in Nigeria, and if it did, under what provision; whether as a statute of general application, or under section 4 of the State Courts (Federal Jurisdiction) Act,[2] which provides that the jurisdiction of the High Court of a Region in relation to marriages, and the annulment and dissolution of marriages and other matrimonial causes shall be exercised in conformity with the law and practice for the time being in force in England.

There is no statutory guidance, save only as regards intestate succession to the property of spouses, under section 36 of the Marriage Act (which applies to the Colony only),[3] as to the effect of a statutory marriage on the property and other rights and liabilities of spouses subject to customary law. Judicial opinions, as noted later, are conflicting and reveal two main views:

(a) spouses subject to customary law who contract a statutory marriage are removed entirely from the ambit of customary law and their personal relations are governed for the most part by the received English law (the general law).[4]

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1. Ibid., p. 212.

2. Formerly cited as the Regional Courts (Federal Jurisdiction) Act, Cap. 117, Laws of the Federation of Nigeria, 1958 Revision. The section has been repealed by S.115(2) of the Matrimonial Causes Decree, 1970.

3. See further, Chapter XIII, pp. 456-460.

4. See Cole v. Cole [1898] 1 N.L.R.15 at p.23; where Griffith, J., stated that the parties to a statutory marriage and their offspring were clothed 'with a status unknown to native law'. See also Re Otoo [1926] Div.Ct. 1926-29, 84 overruled in 1961 by Coleman v. Shang [1961] 2 ALL E.R. 406, P.C.; [1959] G.L.R.390, C.A.

(b) customary law continues to govern the personal relations of the spouses except in so far as a statute expressly or by necessary implication provides otherwise, or the particular transaction is unknown to customary law.[1]

If the first view is followed the Married Women's Property Act automatically applies to wives of a statutory marriage. If, however, the second alternative is preferred, there seems no justification for the automatic application of the Act to spouses of a statutory marriage who are subject to customary law.

It has been argued elsewhere in this thesis that the second approach as stated above, represents a more rational view of the law, and that customary law applies to the spouses of a statutory marriage, who are subject to customary laws, except in so far as these laws have been altered by statute.

The question remains as to whether the property rights of Nigerian married women under customary law has been altered by any statute. It has been previously noted that customary law is applied in Nigeria provided such law

> ... is not repugnant to natural justice equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law and custom.

In the recent case of Adesubokan v. Yunusa[2], the Nigerian Supreme Court held that a rule of customary law which is incompatible with a statute of general application in Nigeria, in the particular case, the Wills Act 1837, was unenforceable by Nigerian Courts. In other words the 'law for the time being in force' include statutes of general application received into Nigeria.

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1. See Coleman v. Shang, ibid.; Smith v. Smith [1924]5 N.L.R.105.

2. [1968] N.N.L.R.97.

(iv) Is the Act applicable in its entirety?

In addition to the substantive provisions of the Married Women's Property Act, there is also a procedural provision. Under the Act, no husband or wife shall be entitled to sue the other for a tort. Section 17 of the Act, however, provides a summary procedure available to either spouse, in any question between husband and wife as to the title to, or possession of, property. Most of the cases in which the Act has been applied directly have involved the application of section 17 of the Act.[1] The parties in these cases have all been spouses of a statutory marriage. It is not readily apparent whether the spouses of a customary or Islamic law marriage can take advantage of this procedure in view of the provision in the High Court laws. For example, the High Court Law of the former Northern Region,[2] section 17(1)(b) provides that the High Court shall not exercise original jurisdiction in any matter which 'is subject to the jurisdiction of a native court relating to marriage, family status, guardianship of children, inheritance or the disposition of property on death'.

To sum up the argument it may be stated that the Married Women's Property Act 1882, satisfies the criteria for the reception of a statute of general application, and the better view is that it is a statute of general application[3] although it has not been specifically accepted as such by the courts. The statute has been applied in several cases involving spouses of a statutory marriage. The Act should, however, only be applied in the case of spouses subject to

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1. See Ogedegbe v. Ogedegbe [1964] L.L.R.209; Osomugha v. Osomugha [1972] 12 C.C.H.C.J.91; Edet v. Edet [1966-67] 10 E.N.L.R.90.

2. Cap. 49, Laws of Northern Nigeria, 1963 Revision.

3. See Park, Sources of Nigerian Law, op. cit., p.51; Nwogugu, Family Law in Nigeria, op. cit., p. 73; Obi, Modern Family Law, op. cit., p. 258.

customary or Islamic laws, when such customary or Islamic law is incompatible with the provision of the Act, regardless of the type of marriage involved.

4. Property rights on divorce or Separation

A. Customary law marriage

Having established the fact that in most systems of customary law in Nigeria a woman has the right to own property before her marriage, and that her ownership of such property is unaffected by the fact of her marriage, it is safe to say that in customary law, the matrimonial property regime which prevails, is the separate property doctrine, whereby each spouse owns his or her own property during the marital relationship.

The next question which has to be considered is what property is a married woman entitled to take away from the matrimonial home when a divorce or separation occurs.

It may seem as a logical conclusion that a married woman who is entitled to own property before and during her marriage cannot be prevented from removing such property from the matrimonial home when she is leaving it, but this has not always been the case in some traditional societies.

(i) Among the Yorubas

As far as the Yorubas are concerned, a divorced wife is entitled to remove all her property, acquired before and during the marriage. Bowen says of the Yoruba wife:

> If divorced without a cause, she takes up all that is hers and returns to her relatives and friends. If divorced for adultery, she or her family are obliged to refund the dowry to the husband. Further than this he has no claim on her property. Even during the continuance of the marriage relation, the woman is sole owner of her property and her earnings.[1]

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1. T.J. Bowen, Central Africa: Adventures and Missionary Labours in Several Countries in the Interior of Africa, 1849 to 1856, 1968, p. 305.

This is also the position among some of the other communities.

The position described by Bowen still obtains among the Yorubas, and this is so, regardless of the type of marriage contracted.[1] The wife is absolute owner of all her property, even in cases where the property has been bought with funds derived from her trade, the original capital for which was provided by her husband.

The effect of divorce on property rights among the Yorubas only relates to certain property directly connected to the marriage itself. The position in relation to the return of dowry on a divorce has already been dealt with.[2] Other gifts, which traditionally had to be given by the bridegroom to the bride on the occasion of the betrothal and marriage, were also refundable. The Marriage, Divorce, and Custody of Children Adoptive Bye-Laws, adopted by the various District Councils, now limit the amount refundable.[3] If gifts are given to the Yoruba wife by her relations, or by her husband or his relatives, absolute ownership in them is vested in the wife, and she has free disposal and control over all such items of property. On a divorce she is free to take them away with her.

It is usual for a Yoruba husband to provide his wife with capital, which might be in the form of cash, or raw products, to be sold for cash. The husband's contribution is often augmented by the wife from her own resources.[4]

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1. See Fadipe, op. cit., p. 88; E.O. Ekundare, op. cit., pp. 24-25.

2. See above, chapter VIII.

3. For the provision of the Ibadan District Council Marriage Divorce and Custody of Children Bye-Laws 1965 in this respect, see above, chapter VIII, 'Any person who demands more than £22.10 dowry and betrothal presents, shall be liable on conviction to a fine of £10, or, in default of payment to imprisonment for two months with hard labour,' section 3(1).

4. A Yoruba wife may have accumulated money from several resources: e.g. from her share of the dowry paid on her behalf, from the cash gifts given to her by her relatives and also by her husband and his relatives on the occasion of her marriage, as well as from pre-marriage trade which she may have carried on - see Fadipe, op. cit., p. 156.,n.1.

Yoruba women have a reputation for trading, and often, the insignificant starting capital of sometimes less than £1, may soon be built up into a prosperous trade, involving thousands of pounds capital. The profits from any trade she indulges in belong exclusively to her and, except where the husband has loaned her some capital on the expressed understanding that it should be repaid, he has no claims on her capital, or on the profit she makes in her trade.[1]

(ii) Among the Igbos.

The position with regard to the Igbo wife again cannot be stated with precision, as it can for her Yoruba counterpart. As usual, the law varies radically among various sub-groups, giving rise to conflicting statements by various writers. For example, Basden, writing about divorce in 1921, says of the Igbo spouses:

> Should the husband be the aggrieved party he orders her to leave the house, or promptly drives her out, at the same time throwing her cooking pot and one or two other personal articles after her. This procedure constitutes permanent divorce, and the action of the husband will be upheld by native law. The wife, so treated, is deprived of all property and also of her children; indeed neither ever were hers. Her only possessions are her cooking pot, market basket and a few other small articles pertaining to the domestic side of the house.[2]

Obi, on the other hand, gives a different view of the property rights of a divorced Igbo woman. He says:

> When a woman leaves her husband or is sent away by him pending a formal dissolution of the marriage, she is entitled to take away with her all her personal effects as well as any movable property which she brought to the matrimonial home or acquired during coverture by her own exertion in her own time or purchased

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1. Information collected from market women in Ibadan.

2. Basden, Among the Ibos of Nigeria, op. cit., p. 77.

> with her own money (and, of course, any gifts made to her for her own separate use by her blood relations or friends.[1]

The position as stated by Basden receives some measure of support from the Customary Law Manual of Anambra and Imo States. Among some communities, all the property of a married woman, including ante-nuptial property brought to the matrimonial home legally belongs to the husband in the case of divorce. Such property may include even the clothes worn by the wife at the time of the divorce, regardless of who initiates, or is responsible for, the dissolution of the marriage. The Customary Law Manual does not state the general law of the Igbos in this respect, but gives the individual laws of the various Divisions. Only seven out of the thirty nine Divisions in the two States listed in the Manual, allow a divorced wife to remove property she acquired during the marriage with her own money or energy. In two of these seven, she has to share some of her property with the husband. Three Divisions deprive her of everything except the clothes she was wearing at the time of the divorce, while Oru Mbanasa in Anambra Division, Et' Etiti, Ukwa and Onitsha Divisions deprive her even of those.[2] She is thus left in the same state as when she came into the world - naked. In Aba Division she could take away nothing at all if the divorce was caused by her fault.

As previously noted, the Manual asserts that these statements of law represent the law as currently practised in modern society, and that they are effective today. If these statements represent the current law, there can be no more glaring example of the wide divergence which may exist between law in theory and law as practised by the people. The Customary Law Manual lists Onitsha Division as one where the wife is deprived of even the clothes she was wearing at the time of the divorce. The practice, at least in Onitsha

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1. Obi, Modern Family Law in Nigeria, op. cit., pp. 370-371.

2. See Customary Law Manual, 1977, op. cit., pp. 308-312.

town and its environs, is radically different.

As previously stated,[1] an Onitsha wife is usually given a considerable amount of property, including land, by her natal family, and indeed by her whole village, when she is taken home to her husband's house on the occasion of her first marriage. The land comprised in such property, unless specifically stated by her parents to the contrary, legally belongs to the husband, and may be inherited by all his sons including those from other wives. Today, parents who make gifts of land to a daughter on the occasion of her marriage, ensure that such lands are conveyed to the daughter herself. In relation to other items of personal property, or land acquired by the wife before, or during, the marriage by her own efforts, and paid for with her money, these belong entirely to the wife when there is a divorce. In many cases, a departing wife also leaves with some of her husband's personal property, as evidenced by complaints made by husbands to the Social Welfare Department, although she is not legally justified in doing so. Very few husbands, if any, will attempt to assert their traditional rights (whatever they may have been) to their divorced wife's property. Any such attempt, regardless of the type of marriage contracted, will be severely criticized, and the man will be ridiculed by the community, especially if the divorce is not due to the wife's fault.

Evidence from individuals indicate that among other Igbo communities, whatever the law was traditionally, women are now free to remove all their movable property from the matrimonial home, and are fully entitled to any immovable property, personally owned, which is not situated on their husbands' family lands. In this respect, Obi's statement given above, correctly represents the modern Igbo law relating to the rights of a divorced woman to her self-owned movable property.

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1. See above, Chapter VI.

Obi, however, makes a further statement about the land rights of a divorced woman. In order to assess this statement it must be given fully. He says:[1]

> The question of a wife's right to her landed property (i.e. buildings, economic plants and the land itself) is more difficult to state with any degree of precision. This is because here we are faced with two conflicting but fundamental principles of customary law. The first is that a person is entitled to the fruit of his labour even where this takes the form of an improvement to another's land, provided only that the improvement was effected with the consent of the landowner in the first place. On this principle, then, a divorced wife should be entitled to the continued use and ownership of what was her landed property during the subsistence of her marriage. The other principle is that non-resident strangers cannot own permanent rights or interests in landed property if they have no intention of establishing any other legal relationship with the local community or any of its members. On this principle, a divorced woman, being now a non-resident stranger in her ex-husband's community (she has to be a stranger in the vast majority of cases on account of the rule relating to exogamy), could not retain her rights over her landed property in these circumstances. Happily, this dilemma never presents itself to the courts because the woman concerned always disposes of all her landed property before the marriage is dissolved. Even where she is driven out of the house by the husband or his family, she still can alienate such property: for though separated from the husband, she is not divorced until the bride price has been repaid or the marriage otherwise judicially dissolved. The woman and her family will not unnaturally play for time in a situation like this; and if, realising this, the husband resorts to court action to obtain divorce, the inevitable delay entailed in litigation would afford the woman all the time she needs at least to give the property away if she cannot or will not sell it. In any case, she (or her family) can always apply to the court for time in which to straighten out her property rights: the courts are not favourably disposed towards property-grabbing husbands, and so will almost certainly grant the time prayed for in these circumstances.

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1. Obi, Modern Family Law in Southern Nigeria, 1966, pp. 371-372.

The statement does not give sufficient facts to permit adequate analysis. For example, the pertinent facts of how the 'landed property' of the wife was acquired is not stated: was the land acquired by sale, or gift, or was it simply 'shown' to her by her husband for the purpose of planting her domestic and other crops? Similarly, from whom the property was acquired, is also not stated; was it acquired from the community, the family, or from the husband's individually owned land? These and other questions are important in assessing the wife's rights.

The passage, however, deserves comment in so far as it gives the impression that a woman can own land which belongs to her husband's family, or community, but she cannot retain such land when she is divorced.

If a wife acquires a portion of land from her husband, his family, or his community, by sale, she cannot be legally deprived of her title to such land on divorce. If she builds a house on the land, her legal title to the house is similarly protected. This legal title extends usually to any economic trees which are on the land. She may not wish to live close to her husband or his family after the divorce, but this is not to say that she cannot legally retain her ownership. Subject to express provisions in the terms of sale of the land to her, her legal right of alienation would similarly be unrestricted. Most communities, and many families, now sell land to non-members of the community or family. There is no justification for the statement by Obi that 'non-resident strangers cannot own permanent rights or interests in landed property if they have no intention of establishing any other legal relationship with the local community or any of its members'. Instances abound in all parts of Nigeria now where non-resident strangers have acquired land from a community by purchase, and have built houses on such land for rental purposes only.

There is no reason to exclude the wife of a member of the community or family from purchasing such lands if she has the financial means to do so. In most cases, her close relationship to the sellers would secure better terms

for her than would be given to a stranger. The possibility of her children inheriting the purchased land would not be lost sight of, and since such children would be members of the community or family, a sale to her would almost be tantamount to a sale to a member of the community or family.

If, however, the land is owned by the family, and the wife is merely given permission to build a house, or to plant economic trees on it, different rules of law apply. In such a case, permission does not invest the wife with legal title to the land. At most, the wife would be considered as a member of the family, and the cardinal principles of family land would apply. Her right in such land can be no greater than that of a member of the family, and in most cases it would be much less. Individual members of a family cannot alienate family property which has not been sold to them,[1] or partitioned,[2] without the relevant consents of the family,[3] since the totality of their interest does not amount to ownership of the property.[4] As was previously stated, and as will again be demonstrated when inheritance rights are dealt with, a member of the family has merely a right to share in the enjoyment of family property during his life-time. Accordingly, any attempted alienation by an individual member of the group, without the relevant consents, is an attempt to give away what he has not got, and is ineffective to pass the legal title. It is, therefore, evident that a wife's power of alienation of family land which she has been permitted to

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1. Ashodi v. Oloje [1958] L.L.R.1.

2. Balogun v. Balogun and Ors. [1943]9 W.A.C.A.78; Chairman, L.E.D.B. v. Ashani and Ors. [1937]3 W.A.C.A.143.

3. Jegede v. Eyinogun [1959] 4 F.S.C.270; Ashodi v. Balogun [1936] 2 ALL E.R.1632 [1936] 4 W.A.C.A.1; Buraimo v. Gbamgboye [1940] 15 N.L.R.7.

4. Adagun v. Fagbola [1932] 11 N.L.R.121; Miller Bros. v. Ayeni [1924] 5 N.L.R.40; Jacobs v. Oladunni Bros. [1935] 12 N.L.R.1.

use by the family is similarly restricted.

Obi's statement that 'even where she is driven out of the house by the husband or his family she can still alienate such property', does not apply to the family land on which the house is built. Improvement to family land does not confer legal title on the member of the family effecting the improvement.[1] If the land is improved by the erection of a house on family land, ownership of the land on which the house stands remains in the family,[2] unless the member had been given the land outright, or had purchased it from the family. Although a member has the right to occupy the house he has built on family land with the consent of the family, he cannot sell the house without the consent of the family, for such a sale involves alienation of the family land on which the house stands. In Omolowun v. Olokude,[3] a member of the family was allowed to build a house on a portion of family land. The house was later sold to the defendant who rented it to tenants. The family sued to recover possession of the land and house, and it was held that when a member of a family had built a house on family land,

> a purchaser of his interest, either from himself or through a court sale, could only acquire the right to demolish the house and remove the materials; the purchaser could not as against the family assert a right to use and occupy the house which was on family land.

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1. Shelle v. Asajon [1957]2 F.S.C.65 at p. 67; 'Family property does not cease to be so because a member of the family has improved it', per Jibowu actg. F.C.J.

2. Bassey v. Cobham and Ors. [1924] 5 N.L.R.90; reclaiming swamp land does not confer any special property in the land reclaimed on the individual who reclaims it as against the corporate title of the family.

3. [1958] W.R.N.L.R.130; see also Odunlam v. Soroyewun, [1949] unreported decision, 21 July 1949; cf. Onwusike v. Onwusike [1962] Suit No. 0/81/59, unreported decision of Onitsha High Court; 'the right of member to occupy a house he built on family land does not entitle him to take rents from tenants in the house without accounting for such rents'.

A recent Supreme Court decision, however, indicates that the rights of a spouse who has built a house on the family land of the other spouse, do not extend to an unrestricted right of alienation of that house. He or she has no more than a right of user during his or her life, and on his or her death, the house reverts to the whole family, and is subject to the usual rules pertaining to family property.

In Oke and Anor v. Oke and Anor,[1] the testator died in 1960, having devised to the defendant, his son, the house in which he had lived and died. The land on which the house was built had been allocated to the testator's wife, who was the plaintiff's mother, by her father. The plaintiff's mother permitted the testator, her husband, to erect a house on the site of her allotted portion, and both of them lived in the house until the testator's death. The question then arose as to whether the testator, who was an Urhobo man, could devise the house by will to the defendant, who was the testator's son by another woman, or whether the Itsekiri customary law of the plaintiff's mother, which incidentally is the same as the Urhobo law of succession, should govern the succession, so that the eldest son of the testator should alone inherit the house in which the testator had lived and died.

The defendant contended that the Wills Law, 1958,[2]

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1. [1974] 3 S.C.1; [1974] 1 ALL N.L.R.443; cf. Jallow v. Jallow [1957] 2 W.A.L.R.64; a Gambian case, where the maxim quicquid plantatur solo, solo cedit, was applied to defeat the claims of a husband who had built on his wife's land with her consent, see below, p. 400 ; There is a conflict of opinion whether the principle applies in customary law, see Santeng v. Darkwa [1940] 6 W.A.C.A.,52 - a house built on family land by a member of the family does not become family property under Akan Customary Law [Ghana] and Okoh v. Olotu [1953] 20 N.L.R. 123. See further, Nwabueze, Nigerian Land Law, 1972, pp. 3-6.

2. Cap 133, Laws of Western State, 1959.

of the former Western State, which operates in the Mid-Western State, gave the testator testamentary capacity to devise the house to him as he should choose, and that the transaction was, according to the Customary Courts Law of the Mid-Western State, governed by English Law.

Elias, C.J.N., delivering the judgment of the Supreme Court, held that customary law, and not English law or the Wills Law, governed the succession to the estate of the deceased testator, and that accordingly, the plaintiff was entitled to the house as the eldest son of the testator under the Itsekiri/Urhobo customary law. That section 3 of the Wills Law makes the testamentary capacity of a testator subject to any relevant customary law, and in any case, deals only with the devise of a 'real estate' an interest unknown to customary law. The Court held that neither could the plaintiff's mother make an absolute gift of her portion of family land to her husband, the testator, nor could the latter alienate whatever interest he might have in the house to anyone other than his first son.[1]

From this judgment it is clear that the testator was not the beneficial owner of the house with an absolute right of disposal.[2] Consequently, he had no right to dispose of the house by sale during his life-time, nor by will, to anyone who was not entitled to succeed to it under the rules of customary law pertaining to the particular society. This is the normal rule pertaining to family land which is unpartitioned. No individual member may alienate his interest in family land, for his interest is not

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1. The son's right is one, not of inheritance but of his membership of his mother's family, see Sogunro-Davies, v. Sogunro and Ors. [1929] 9 N.L.R.79.

2. See Bankole and Ors. v. Tapo [1961] 1 ALL N.L.R. 140 - a father's allotment of a portion of his individually owned land to a grandson divested the property of its character of family property after the death of the father.

absolute.[1] The principle is, by this judgment, extended to fixtures on the land, when erected by a non-member of the family.[2]

From this it follows that if a wife builds a house on her husband's family land, and a divorce ensues, she has no beneficial interest in the house which she can dispose of at will to a non-member of her husband's family.

The next question is: what is the right of a wife to economic trees and other crops planted by her on her husband's family land when the marriage ends in divorce? A member of the family may plant economic trees on family land with the family's consent or acquiescence.[3] The growing crops or trees, under customary law, becomes the individual property of the member who planted them, and he has full rights of alienation by sale or otherwise.[4] In view of the provision in the Interpretation Act, 1964,[5]

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1. See Taylor v. Williams and Anor [1935] 12 N.L.R.67; a testatrix cannot dispose of an undivided share in family property by will even to her own son; see also Ogunmefun v. Ogunmefun and Ors. [1931] 10 N.L.R.82; but see Odejoke v. John Holt [1942] 8 W.A.C.A. 152 where it was held that a member's right of residence in a family house is attachable, as well as transmissible.

2. See Erikitola v. Alli and Ors. [1941] 16 N.L.R.56; and Akeju v. Chief Suenu and Ors. [1925] 6 N.L.R.87; a slave of Onikoro family could not alienate family land without express authorisation. It should be noted that under the Interpretation Act, 1964, 'land' includes any building and any other thing attached to the earth or permanently fastened to anything so attached' - section 18(1). See also the Ghanian case of Amissah-Abadoo v. Abadoo [1974] 1.G.L.R.110 where it was held that a member of a family who built a house on family land had only a life-interest in the house with no alienable interest which he could dispose of by will. Contrast, Larbi v. Cato [1959]G.L.R. 35; Ansah v. Sackey [1958] 3 W.A.L.R.325; Amoabimaa v. Okyir [1965]G.L.R.59, pp. 63-74.

3. Okoh v. Oluto and Ors [1953] 20 N.L.R.123.

4. See Okoro, The Customary Laws of Succession, op. cit., p. 23.

5. No. 1 of 1964, Laws of the Federation of Nigeria.

that 'land' includes any building and any other thing attached to the earth or permanently fastened to anything so attached, a wife who plants on her husband's family land has no legal right to remove trees or anything permanently attached to the land. In the absence of direct legal authority it submitted that a divorced wife has no right to remove or to sell the crops she planted on her husband's family land, without the family's consent.[1]

Obi states that the 'dilemma' of a wife being prevented from retaining her rights 'over her landed property ... never presents itself to the courts because the woman concerned always disposes of all her landed property before the marriage is dissolved.' While this statement may be true with reference to minor crops planted on her husband's family land, the fact is that modern Nigerian women rarely build houses on land belonging to their husband's family. The more frequent practice is for them to build on land owned by their natal family, or on land acquired by purchase.

What the position is when a woman builds on land individually owned by her husband, or contributes substantially to a building erected by her husband, will be considered later when dealing with the position under statutory marriage.

(iii) Among other communities.

Among most other groups, where the 'separate' system of property operates, a wife is entitled to remove all property absolutely owned by her, both ante-nuptial and post-nuptial. She has no claim on divorce to her husband's property, nor in some cases, to property that she acquired from him or his family.[2]

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1. See the Gambian case of Jallow v. Jallow [1957] 2 W.A.L.R. 64; see further, below, p. 400.

2. See Forde, Peoples of the Niger-Benue Confluence, op. cit., p. 99; Bradbury and Lloyd, The Benin Kingdom, op. cit., p. 98.

The societies where all property acquired by the wife legally belongs to the husband, allow the wife to remove only the property which the husband permits her to remove.[1]

It must be emphasized, however, that whatever the traditional law in this respect may have been, the modern practice in most communities is that a divorced wife is entitled to remove all items of property she can identify as legally belonging solely to her, and acquired by her own efforts.

A more difficult question arises when property is purchased jointly, or when the husband buys things for the wife's personal use, for example, clothes, jewelry, or a car, or for the use of the family as a whole - furniture, domestic utensils, etc. In most cases customary law gives her no right to remove such articles purchased by her husband. No cognizance is taken of a wife's contributions to the acquisition of property that is not expressed in terms of money. Domestic labour entailed in the rearing of children, or management of the home, are not taken into consideration in the distribution of marital property. In other words, a strict separation of property between husband and wife is the general rule. Community property, under which property acquired by either spouse is legally owned by both spouses during the subsistence of the marriage, and is shared equally between them if the marriage is dissolved by divorce is unknown to Nigerian customary law.

(iv) Right of a wife to remain in the matrimonial home.

It has been seen earlier,[2] that in most societies,

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1. See e.g. the position among the Idomas, where on a divorce the wife's property is shared equally between the spouses - Armstrong, 'Intestate Succession among the Idoma', op. cit., p. 227; cf. Thomas, Anthropological Report, on the Ibo-Speaking Peoples, op. cit., Part IV, p. 137.

2. See above, Chapter VIII, pp. 536-544.

a wife married according to customary law has a legal right, and indeed, a legal obligation, to live in the house provided for her by the husband. Traditionally, a separate house was built for each wife for her exclusive use and occupation. This was the practice in all communities, almost without exception.[1] The right of each wife to a separate accommodation, is to some extent, recognized by Governments. For example, houses built for occupation by members of Parliament, and in the Northern States, for senior civil servants, are invariably built with wings so as to accommodate each wife in a separate block.

Pressure of land space in the urban areas forced a change in the type of houses now being built; and the prohibitive costs involved in building a modern house have necessitated a change in this pattern of a separate house for a wife. It has been replaced by the allotment to a wife, or to each wife in a polygamous family, of a room in the husband's house.[2]

What is the right of a wife to remain in such room, or house, as the case may be, provided for her by the husband, when she is divorced? Two cases illustrate the right of a wife to such room or house. Although both cases involve the devolution of property on the death of the husband, the principle, nevertheless, applies equally to a case of divorce during the husband's lifetime, as is evidenced by the obiter dicta of the judgements.

The first case, Okeke v. Okonkwo[3] concerned the

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1. See Partridge, Cross River Natives, op. cit., p. 255; Mockler-Ferryman, Up the Niger, op. cit., p. 37; Ward, Marriage Among the Yoruba, op. cit., p. 38, Meek, Northern Tribes of Nigeria, op. cit., p. 196; Galletti, Baldwin and Dina, Nigerian Cocoa Farmers, op. cit., p. 75; Tremearne, The Tailed Head Hunters, op. cit., p. 137.

2. In the rural areas where thatched houses are still in use, a wife may continue to be given a separate house. In some cases two or more wives share a modern concrete house, while the husband reserves another house for his exclusive use.

3. [1962] Suit No. O/37/62, unreported decision, Onitsha High Court.

customary law of the people of Amabia, an Igbo town in Anambra State. The plaintiff in this case claimed a declaration of title to a parcel of land called ogbolodo or mkpuke, being the apartment of the plaintiff's grandmother, built by his grandfather for her, according to the custom of the society. In establishing the legal right of his grandmother to the house built for her by her husband, the following evidence was given as correctly representing the customary law of the people.

> The object of a husband who carves out an apartment for his wife from his compound is to give her some degree of privacy. It does not make it her own separate property in the sense that she can sell the small piece of land where the small house is built. She can live there as long as she remains his wife but if she happens to leave the man during his life-time, he can give the compartment to another woman.

Kaine, J., in the Onitsha High Court, accepted this evidence. He held that a wife could not pass to her children what she had not got, that is, the absolute ownership over the property, and that even on the death of the paterfamilias, the ogbolodo remained intact as family property. All an individual has is 'the right of occupancy, or in other words, usufructuary rights, and not absolute ownership to the exclusion of the other children'. He held that the possessory right which the plaintiff had over his grandmother's ogbolodo, if at all he had any, was not such as to warrant a declaration of title to it which would make him an absolute owner to the exclusion of all the other children.

The other case was declaratory of Yoruba customary law. In Oloko v. Giwa,[1] the defendant took possession of certain property in Lagos on the allegation that it had been part of his deceased father's property. He claimed that his father had, during his life-time, allotted to each of his wives a separate house or room (which was not proved and was

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1. [1939] 15 N.L.R.31.

doubted by the court), and that the property in dispute had been allotted to the wife who was the mother of the defendant. The plaintiff sued on behalf of himself and the other children of the deceased father for recovery of possession of the property.

An expert witness gave evidence to the effect that when a husband builds separate living houses or rooms for his wife, the house or room of each wife belonged to her and was inheritable by her children, and in default of issue, by her natal family. Graham Paul, J., commenting on this evidence said:

> I have heard a good deal of nonsense talked in the witness box about Yoruba custom but seldom anything more ridiculous than this. Even the defendant's Counsel himself had to throw over this witness and I do not really blame him for that.

It was held that no such custom as that alleged by the defendant existed in Yoruba customary law, and that an allotment of a house or room by a man to each of his wives did not vest the house or room so allotted in the wife as her separate property, and that on his death, such houses or rooms became part of the real property left by him.

In both Yoruba and Igbo customary law, therefore, a wife has no ownership of the house her husband gives her to live in during the marriage, and on divorce she has no enforceable legal right to remain there against the wishes of her husband.

There is no evidence that the customary laws of the other Nigerian communities are contrary to this.

When the spouses live in a house owned by the wife, the husband similarly acquires no legal title to it, and he has no right of occupation after a divorce.

B. Islamic law marriage

In accordance with the doctrine of separate property of husband and wife which is recognized by Islamic law, when a Moslem wife is divorced by her husband, she is

legally entitled to remove all her separate property from the matrimonial home. This includes property given to her by her husband before and after the marriage. If her dower has not been paid, it becomes immediately repayable, and can be enforced by an action in court. The Koran advises husbands to be generous to their divorced wives. Thus it provides in Sura II, verse 231

> ... when ye divorce women, and the time for sending them away is come, either retain them with generosity, or put them away with generosity.

and again in Sura LXV, verse 6.

> Lodge the divorce whenever ye lodge, according to your means; and distress them not by putting them to straits.

When a divorce is instituted by the wife, however, she may have to give the husband a considerable portion of her property in order to secure her release from the marital bonds.[1]

If contentions arise between husband and wife concerning furniture, or other movable property, and if there is no proof as to who is the owner of the different articles, then the question should be decided according to local custom. The wife will be awarded those objects which are generally used by women, - jewellery, female clothes, ornaments etc. - the ownership of which she claims on oath. Of the other objects commonly used by both spouses, the husband is awarded those which he claims on oath to be his own. Similarly, if the husband declares on oath that some objects commonly used by women were bought for his own use, and not for his wife's, such objects shall be awarded to him.[2]

A wife is not legally entitled to any of her husband's

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1. See below, Chapter IX, pp. 86-89.

2. See Ruxton, Maliki Law, op. cit., pp. 116-117; see also Ma Khatun v. Ma Bibi [1933] A.I.R. (Allahabad), 206, 209, in Moslem family law there is a presumption that household furniture belong to the husband.

property when there is a divorce, and like customary law, maintenance of a divorced wife is unknown to Islamic law.[1]

C. Statutory marriage

It has been noted that the separate property doctrine applies to the spouses of a statutory marriage.[2] Marriage does not affect the ownership of property vested in either spouse at the time of the marriage. Similarly, property acquired by either after the marriage, with money belonging solely to him, or her, will remain the separate property of each spouse. Consequently, when a divorce or separation occurs, either spouse is entitled to claim property which is exclusively his or hers.

In addition to this, however, a statutory spouse has other proprietary rights and obligations.

The proprietary rights and obligations of the wife of a statutory marriage, when the marital relationship is disrupted either by separation or divorce, are governed principally by two statutes:
(i) the Married Women's Property Acts 1882-1893;
(ii) the Matrimonial Causes Decree, 1970.

(i) Married Women's Property Act, 1882.

The Married Women's Property Act, 1882,[3] section 17, provides:

> In any question between husband and wife as to the title to or possession of property, either party ... may apply by summons or otherwise in a summary way to any judge of the High Court of Justice or (at the option of the applicant, irrespective of the value of the property in dispute) to the judge of a

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1. See further, below, p. 414.

2. See above, p. 345

3. 45 and 46 Vict. C.75; 17 Stats. 116.

> County Court of the district, for an order, and the judge "may make such order with respect to the property in dispute as he thinks fit".

When this section is invoked, the court has a wide discretion as to the enforcement of the proprietary or possessory rights of one spouse against the other spouse. The jurisdiction must, however, be exercised judicially. It was claimed that this gave the court 'a free hand to do what is just' in all the circumstances, ignoring the strict legal rules governing the title to property.[1] The House of Lords in England has recently denounced this view as heretical: 'no Parliament of that era could have intended to put a husband's property at the hazard of the unfettered discretion of a judge (including a county court judge)'.[2]

The section is invoked mainly in two circumstances:

(a) Disputes as to title to property

(i) Joint property

When parties to a marriage acquire property, they rarely contemplate the collapse of the marriage, and their respective rights in such property are seldom discussed, let alone defined. When the marriage breaks down, however, difficult questions as to ownership may arise. A wife may have contributed her labour, money and expertise in building, or purchase of land which is conveyed (as usually is the case in Nigeria), in the name of the husband only. The spouses may also have bought furniture, cars, and other items of property with the joint contribution of both parties. Has a spouse the right to claim any part of such property, or does the property belong exclusively to the

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1. See Hine v. Hine [1962] 1 W.L.R.1126; Appleton v. Appleton [1965] 1 W.L.R.25.
2. Pettitt v. Pettitt [1970] A.C.777, 793, per Lord Reid.

spouse in whose name the legal title is vested?

Either spouse may claim a share in such property by instituting proceedings under section 17 of the Married Women's Property Act, 1882.[1] Proceedings may be brought under this section, regardless of the responsibility of the applicant for the breakdown of the marriage.[2] Such proceedings are quite different to divorce proceedings, and if proceedings under section 17 have been commenced, they can be continued, notwithstanding that the marriage has since been resolved by a decree absolute of divorce.[3]

In Egunjobi v. Egunjobi,[4] the parties were married in 1969. Before the marriage, the husband had acquired a piece of land on which he commenced a building. The building had reached lintel level before the wife took over supervision of the work, and made various financial contributions estimated at ₦1,170, towards the completion of the building. She also contributed financially to the purchase of some furniture for the house. The husband's contribution, less the value of the land and blocks was ₦2,169.90. In 1972 the marriage broke down, and in 1973, the decree nisi was made absolute. The wife applied under section 17 of the Married Women's Property Act, 1882, for a declaration that she was entitled to an equal share in the property, or in the proceeds in the event of a sale, and in the furniture enumerated in her application.

Agbaje, J., held that the husband and wife had both made substantial financial contributions towards the building, and the law would impute to them an intention to create a trust for each other in respect of the building, and for

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1. Asomugha v. Asomugha [1972]12 C.C.H.C.J.91.

2. Wilson v. Wilson [1963] 1 W.L.R.601, C.A.

3. Egunjobi v. Egunjobi [1974] 4 E.C.S.L.R.552.

4. [1974] 4 E.C.S.L.R. 552.

the same reason both parties had beneficial interests in the furniture which was found by the court to be purchased jointly by them. On the facts of the case the court held that the wife was entitled to one-third share in the house and to a half share in the furniture purchased jointly.

As far as the joint building is concerned, it is interesting to compare this case with Jallow v. Jallow,[1] a Gambian case which came on appeal to the West African Court of Appeal in 1957. The plaintiff was the divorced husband of the defendant. Prior to the divorce, the husband and wife occupied land which had belonged to the wife alone before the marriage. During the marriage, the husband and wife had erected buildings on the land, the cost of these being met from joint funds to which they each contributed. After the divorce, the husband claimed from the defendant half the value of the buildings. The West African Court of Appeal held that the rule quicquid plantatur solo, solo cedit is displaced only where one person builds on the land of another, and the latter, as a result of his laches, is debarred from asserting his own interest. Where the builder is conscious of the defect in his own title, but nevertheless builds on the land of another, he may not avail himself of this exception, and the fact that the relationship between the parties is that of husband and wife makes no difference this rule.[2]

It would appear that the same result would have been reached by an application of the rule as to the pre-sumption of advancement between husband and wife, in the latter case. If the wife alone provides the purchase money for property which is put in her husband's name, or makes an investment in her husband's name, unless there is actual evidence to the contrary, the husband is regarded as holding the property or

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1. [1957] W.A.L.R.64.

2. See the Ghanian case of Amissah-Abadoo v. Abadoo [1974] 1 G.L.R. 110, where it was held that

"(4) In order to exclude the application of the maxim quicquid plantatur solo, solo cedit in respect of lands held under customary law, it must be established that:
(a) The owner of the land either consented or granted leave and licence or in the alternative, he had acquiesced in the construction of the building so that it would be inequitable to permit him to claim what was on the land and which he had not built, and

F/note continued

investment as a trustee for his wife. On the other hand, if a husband purchases property or makes an investment in his wife's name he is presumed to intend a gift to his wife and the presumption of advancement operates to give her prima facie the beneficial interest in the property. Precisely the same rules operate if both provide the money. If the property is conveyed into the husband's name alone, he will hold it on trust for them both, and each will be entitled to a share proportionate to the contribution. If, however, the property is conveyed into the wife's name alone, the husband will be presumed to have made a gift of the whole of the property to her.[1] The presumption in both cases is rebuttable, but the facts in Jallow v. Jallow[2] would hardly have amounted to a rebuttal of the presumption.

The principle applied in Jallow v. Jallow[2] was not considered by Agbaje, J., in Egunjobi v. Egunjobi.[3] The learned Judge relied on the two House of Lords' cases of Gissing v. Gissing[4] and Pettitt v. Pettitt[5] and other cases. He said:

> I am prepared to treat the supervision of the building operations at Quarry Road by the wife as a direct contribution by her to the building. This type of work, supervision of building operations, is, in my view,

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(Footnote cont'd. from previous page)

(b) The persons who erected the building or cultivated the farm were strangers to the land on which they had built or farmed.
There should, however, be no extension of the non-applicability of the maxim to cover cases like the instant one where the person constructing the building was himself a member of the family owning the land. Adu v. Sarkodee Addo, Court of Appeal, 31 March 1969, unreported; digested in (1969) C.C.59 cited. Asseh v. Anto [1961] G.L.R. 103, S.C. distinguished. Quaere. It was doubtful whether in the light of the firmly-established customary law relating to rights retained by members of family in respect of family land which they had reduced into occupation, it would be safe to extend the non-application of the maxim to cover such situations without creating an unwarranted innovation into this well-established principle."

1. See Bromley, Family Law, 1974, p. 447, et al. Mercier v. Mercier [1903] 2 Ch. 98, C.A. and Silver v. Silver [1958] 1 ALL E.R. 523, C.A.
2. [1957] W.A.L.R. 64.
3. [1974] 4 E.C.S.L.R. 552.
4. [1970] A.C. 777.
5. [1970] 2 ALL E.R. 780, H.L. [1971] A.C. 886.

> of a substantial type such as a contractor would normally be engaged to do ... I am also prepared to treat a spouse who contributes to the building of a house on the land which is owned by the other spouse, as in this case, on the same footing as a spouse who contributes to the purchase of, or to the payment of mortgage instalments on the house standing in the name of the other. If I am wrong in this view, I am prepared to treat the contributions of a wife to the building of a house on the land belonging to the other as expenses towards the capital improvement of the land...

The Judge concluded that the various contributions of the wife, her financial contribution, as well as supervision of the building, amounted to a substantial contribution by her. He continued:

> And when I apply the principles of law which I have enuciated [sic] above, this substantial contribution raises the inference of a trust. The law imputes to the husband an intention to create a trust for her in respect of the building at Quarry Road, Abeokuta.[1]

The decision in Egunjobi v. Egunjobi,[2] is important, in view of the fact that many wives in Nigeria supervise, as well as make contributions to, the building of their husband's houses.

There is no legal bar to a wife married under customary law, which denies her a share of any of her husband's property to which she has made substantial contributions, taking advantage of section 17 of the Married Women's Property Act, 1882.[3]

The presumption that if husband and wife both provided part of the purchase money for property which is in the husband's name, he will hold as trustee for them both in the proportions to which they provide the purchase money was expanded in Rimmer v. Rimmer[4] to one that if both husband and wife had subscribed, however unequally, to the purchase of an asset in the name of one of them only, the legal owner

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1. Egunjobi v. Egunjobi [1974] 4 E.C.S.L.R. 552, at p. 561.
2. Ibid.
3. See above, pp. 375-377.
4. [1952] 2 ALL E.R. 863; [1953] 1 Q.B. 63, C.A.

would hold the asset for them both in equal shares. Such a principle could, in some cases, lead to great injustice, as it would give a spouse who had contributed very little to the asset, an equal share. It can be described as an attempt to smuggle through the backdoor a system of community of property, with reference to the matrimonial home. Fortunately, such an approach was limited by the decisions of the House of Lords in Pettitt v. Pettitt,[1] and particularly in Gissing v. Gissing[2] where it was condemned in the words of Lord Reid: 'the high-sounding brocard equity is equality has been misused'.

(ii) Separate property

Under section 12 of the Married Women's Property Act, 1882, a wife can institute a civil action against all persons, including her husband, for the protection and security of her separate property, but neither husband or wife may sue the other for a tort.

In Asomugha v. Asomugha,[3] the husband instituted a divorce suit. Before the issue of the Directions for Trial, the husband applied by summons pending suit for the release to him of his personal effects including his lecture notes, books, dresses, shoes, wig and gown, certificates and passports which he claimed were in the custody of the respondent wife. Counsel for the respondent wife contended that the court had no jurisdiction, since the applicant's summons was in the nature of a claim in detinue which is a tort.

Odesanya, J., noted the bar against actions for tort between husband and wife under the Married Women's Property Act, 1882, but held that although the husband

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1. [1969] 2 ALL E.R.385, H.L.; [1970] A.C.770.

2. [1971] A.C. 886.

3. [1972] 12 C.C.H.C.J.91.

could not take advantage of section 12 of the Act to recover his property from his wife, he was entitled to do so under section 17 of the Married Women's Property Act, 1882, which was available to either spouse. The husband had not applied under any section of the Married Women's Property Act. The learned Judge, however, treated his claim as an application based on section 17 of the Act, on the ground that the section is purely procedural, providing a very useful summary method of determining between husband and wife questions of title and the right to possession of property. He stated that he would not 'allow procedural rules to occasion injustice'.

It is respectfully submitted that, although the Judge's sentiment on the administration of justice is laudable, its application in this particular instance is a little less so. Not having examined the merit of the husband's case, it was premature for the Judge to state that injustice would be occasioned if the husband was made to observe the correct procedure by bringing his action under section 17. Failure to observe the correct procedure may also result in injustice.[1] Although the procedure under the Married Women's Property Act, 1882, is summary, an applicant nevertheless ought to state that he is basing his claim on the Act, and specify the section or sections on which he depends. The intention to institute proceedings under the Act should not be imputed to him by the Court, nor should an action for the tort of detinue be translated

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1. For example, the Court has more extensive powers under section 17 than it has in a common law action in tort. "Under section 17 the intention is that in the innumerable and infinitely various disputes as to property which may occur between husband and wife, the judge should have a free hand to do what is just. The discretion is no way fettered, though it must be exercised judicially". per Denning, J., (as he then was) H v. H [1947] 63 T.L.R.645, 646. Although the Judge's discretion has been limited by Pettitt v. Pettitt [1969] 2 ALL E.R. 385 H.L.[1970] A.C. 770, a judge still has wider powers under the section than in a tort for detinue.

by the Court into a claim under the Act.

(b) Disputes as to possession of the matrimonial home.

The concept of the matrimonial home has been previously discussed.[1] The wife of a statutory marriage has a right to live in the matrimonial home provided by her husband, and the husband has a duty to provide such a home according to his means and status in life.[2] So long as the right of consortium exists between the spouses, both are entitled to reside in the matrimonial home, regardless of whether the legal title or the beneficial interest belongs to the wife alone or to the husband alone. The right of both spouses to occupy the matrimonial home is subject to a reasonable standard of behaviour, and the court has jurisdiction to restrain one party (usually the husband) from entering the matrimonial home if his or her conduct justifies such a course, but the jurisdiction would be exercised with care especially where it involves breaking up the matrimonial home.[3]

In Jones v. Jones,[4] the wife moved for an order restraining the respondent from entering, residing, or living in the matrimonial home, part of the estate of her deceased father, on the ground that the respondent husband threatened to injure or kill her, and had to be

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1. See Chapter VII, above, pp. 536 et al.

2. Jones v. Jones [1959] L.L.R.69.

3. Ibid.

4. [1959] L.L.R.69; cf. Shipman v. Shipman [1924] 2 Ch.140, 146, C.A.; Gorulnick v. Gorulnick [1958] P.47, C.A.; Gurasz v. Gurasz [1970] P.11.

bound over by the magistrates to keep the peace and be of good behaviour for twelve months because of his conduct. The respondent challenged the title of the petitioner to the matrimonial home, and alleged that the property was not devised to her, nor had she an 'absolute interest in the property'. Onyeama, J., held that the legal title of the petitioner to the house was not the overriding consideration in determining whether or not to grant the application. Following Boyt v. Boyt,[1] he held that the court will restrain one spouse from forcing his or her society upon the other, and from other acts of molestation. The application was granted.

In normal circumstances, however, regardless of sole ownership of the matrimonial home by one spouse, both parties have the right to occupy the matrimonial home:

> It is a consequence of the mutual right and duty of spouses to receive and render consortium, that if one is the sole owner of the dwelling house which constitutes the matrimonial home, that spouse is not allowed to treat the other as a stranger there. Moreover, if the home is owned by the husband, the wife normally has an additional reason for not being treated as a stranger: namely her right at common law to be supported by him according to his means.[2]

But what of the position when the marriage breaks down? Two problems may be involved here: first, to determine

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1. [1948] 2 ALL E.R.436, C.A.; see also Short v. Short [1960] 3 ALL E.R.6, C.A. Compare the English case of Jones v. Jones [1971] 2 ALL E.R. 737, C.A. (husband ordered to leave the house with his mistress whom he had installed there, although there was no threat to the wife's physical safety.).

2. J.C. Hall, Sources of Family Law, (Cambridge: Cambridge University Press, 1966), p. 115; see also National Provincial Bank Ltd. v. Ainsworth [1965] A.C.1175.

the beneficial ownership of the matrimonial home, and secondly, to determine whether one party has a right to reside in a matrimonial home to which he or she has no title.

(c) Ownership of the matrimonial home

English law knows no marital community of property. Property purchased by one spouse with his or her own money presumptively belongs to that spouse to the exclusion of the other. Attention has already been drawn to the equitable principles of a resulting trust, and advancement, which may be applied to disputes as to ownership of property between husband and wife. These principles also apply to disputes between husband and wife as to the ownership of the matrimonial home, and need not be repeated here.[1]

(d) Right to reside in the matrimonial home

A series of modern English cases have established the principle that if the husband has deserted the wife, she is entitled to continue to reside in the matrimonial home, even though the legal title is vested in the husband; her right to do so is, as against him, analogous to an irrevocable contractual licence, and it can only be lost either by her misconduct, or by order of court, or by divorce, though it is not lost by a judicial separation.

The only reported Nigerian case on this point seems to be Ogedegbe v. Ogedegbe,[2] decided in 1964. The wife in this case brought an application under section 17 of the Married Women's Property Act, 1882, for an order of possession of the matrimonial home. The applicant and the respondent, who were husband and wife, lived at a house in Yaba. The respondent deserted the applicant and moved to another

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1. See above, pp. 398 et al.
2. [1964] L.L.R.209.

house. The applicant remained in the matrimonial home, lived in one of the rooms, and let out three other rooms for which she collected rents, while the respondent collected the rents of the remaining rooms. The respondent demolished the matrimonial home for the purpose of re-building it, and the applicant was forced to quit the house. After the house was rebuilt, the respondent let out the whole house, and provided no alternative accommodation for the applicant. The applicant applied for possession of the whole house, pursuant to the provision of section 17. Adedipe, J., held that the tenants to whom the entire building was let out by the respondent had no better right to occupy the house than the applicant, and that the application was properly brought under section 17 of the Married Women's Property Act, 1882. The Judge cited with approval many English cases, notably Bendall v. McWhirter,[1] and Street v. Benham,[2] in which it was held that the wife had an irrevocable right to remain in possession of the matrimonial home solely owned by her husband. In Erington v. Erington,[3] Denning, L.J., (as he then was), held that the wife in such a case was a licensee with a special right - under which the husband cannot turn her out except by an order of the court, and in Bendall v. McWhirter,[1] the same learned Judge declared;

> The authority which is thus conferred on her is an authority to stay in the house until the court orders her to go out. This authority flows from the status of marriage coupled with the fact of separation owing to the husband's misconduct ... She may perhaps sublet some of the rooms so as to help keep herself.[4]

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1. [1952] 1 ALL E.R.1307; [1952] 2 Q.B.466, C.A.

2. [1954] 1 ALL E.R.532.

3. [1952] 1 ALL E.R.149.

4. Ibid., Cf. Thompson v. Earthy [1951] 2 K.B.598, in which Roxburgh J. expressed a contrary decision which was eventually vindicated by the House of Lords in National Provincial Bank v. Ainsworth [1965] A.C. 1175, which over-ruled Bendall v. McWhirter and similar decisions.

These cases, and a series of others, had laid down the rule that a deserted wife could enforce her right to remain in the matrimonial home of which her husband was the beneficial owner, not only against him, but also against anyone claiming through him, other than a bona fide purchaser for value of a legal or equitable estate or interest without notice of her claim. Indeed, in Street v. Benham,[1] Lynskey, J., stated that if the rule was otherwise

> It would mean that a guilty husband could transfer the house into the name of his new mistress and then get her to evict his innocent lawful wife from the matrimonial home. No civilised community could tolerate such a cynical disregard of the married state. Equity demands that the succession in title should be in no better position than the husband.[2]

The validity of the 'deserted wife's equity' was eventually considered in 1965 by the House of Lords in National Provincial Bank Ltd., v. Ainsworth.[3] The husband had deserted his wife (the respondent) and left her and their children in the matrimonial home which he owned. He then incorporated his business into a company and conveyed both the matrimonial home and his place of business to the company, which then charged both properties to the appellant bank to secure a loan. The loan was not repaid and the bank, as mortgagee, claimed possession of the properties charged. The wife set up her 'deserted wife's equity', but it was unanimously held that her defence must fail, and that a claim for possession of the matrimonial home from a genuine purchaser of the premises from the husband cannot be defeated.

Although these English cases are not binding on Nigerian courts, they have persuasive authority, and if followed, a deserted Nigerian wife would not be entitled to claim possession of the matrimonial home of her husband from

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1. [1954] 1 ALL E.R.532.
2. Ibid.
3. [1965] 2 ALL E.R. 472, H.L.[1965] A.C.1175

a genuine purchaser. The situation envisaged by Lynskey, J., as stated above is therefore possible, although a mistress might not be regarded as a genuine purchaser.

Under the common law, apparently, a husband could not claim to remain in possession of the matrimonial home after his wife left, if the home belonged to her. The right to occupy the home after separation is, at common law, part of the right to be supported.[1]

(ii) The Matrimonial Causes Decree, 1970.

In proceedings under the Matrimonial Causes Decree, 1970, the court may by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just in the circumstances of the case.[2]

Although this provision can be useful in a number of cases, it has not been frequently utilised by the courts in giving a divorced wife any part of property belonging solely to her husband, or of property jointly owned by the parties. In Okala v. Okala,[3] Agbakoba, J., found that the respondent wife had made significant contributions to the marriage, and had also contributed financially to a house built by the husband. Although he refused the wife's prayer for maintenance, he held that the wife was entitled to a lump sum payment under section 73(1) of the Matrimonial Causes Decree, 1970. The wife was given N500.00. Whether this sum represented her financial contribution to the

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1. See the Law Commission Working Paper, No. 42, op. cit., pp. 34-35, par. 1.3; Rawlings v. Rawlings [1964] P. 398, 416, C.A. Cf. Bedson v. Bedson [1965] 2 Q.B. 666, C.A.; See also Jones v. Challenger [1961] 1 Q.B. 176. Until the court has ordered him to go, or until decree absolute, he is not a trespasser: Morris v. Tarrant [1971] 2 W.L.R. 630.
2. Matrimonial Causes Decree, 1970, section 72(1).
3. [1973] 3 E.C.S.L.R. 67.

building of the house, or whether it was for maintenance, was not stated.

In Anoka v. Anoka,[1] the matrimonial home was built by the joint efforts of the parties. The Judge disregarded entirely the contribution of the wife towards the building of the matrimonial home. Although the husband, a senior inspector of education, was found guilty of adultery, the wife, a staff nurse, was given no maintenance, nor any sum for her financial contribution to the building of the matrimonial home.[2]

5. Rights of maintenance after a divorce

A. Customary Law.

The maintenance of a wife during the subsistence of the marriage, while the parties are living together, has been discussed in previous chapters.[3] This section examines the wife's right of maintenance after the marriage has broken down by separation or divorce.

One of the few principles of law which is of universal application in the customary law systems of the various Nigerian communities is that a divorced wife is not entitled to maintenance for herself, from her husband. If she retains custody of minor children, the husband has a duty to maintain these children, but no maintenance is due to the wife herself once the marriage ends.

In Adeleke v. Hannah Yinka,[4] the plaintiff, who had obtained a divorce from her husband married according to

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1. [1973] 3 E.C.S.L.R.51.
2. See Eyo v. Eyo [1972] 2 C.C.H.C.J.121 where although the husband's gross income was stated as N26,460.00, and the Judge believed he was earning more than that, N400.00 maintenance per month, instead of a lump sum was awarded.
3. See above, Chapters VII, IX, and XI.
4. [1976] Suit No. M/559/76, unreported, Customary Court, Grade B, Mapo Ibadan, 5 Nov. 1976.

customary law, applied for maintenance for herself and the only child of the marriage. The Judge of the Customary Court Ibadan, with reference to the plaintiff's claim for her own maintenance allowance, declared:

> Payment of such an allowance to a divorced woman is contrary to Native Law and Custom. It is also against natural justice, as a divorced woman is at liberty to remarry to another man immediately the marriage is dissolved in the court and it is the duty of the new husband to maintain her.

The Judge's perception of natural justice may have been coloured by the fact that Yoruba women usually remarry after a divorce, and that they are entitled to their separate property during the marriage, and after a divorce. But the idea of a husband maintaining his divorced wife is entirely unknown to Nigerian customary law in traditional society, even in those communities in which all the property of a wife legally belonged to the husband. Indeed, it could not have been otherwise in the social context of traditional societies.

Contrary to the views of some writers that a wife in customary law traditionally had a right to maintenance from her husband during the subsistence of the marriage, the view has been advanced elsewhere in this thesis[1] that, strictly speaking, no right of maintenance as known to the common law of England existed in traditional customary law. The husband in farming societies had a duty to allot his wife a portion of land for her separate use, or allow her to interplant her crops among his. From the yield of these crops, in most societies, she had a corresponding duty to supply all other foodstuffs such as fish, oil, peppers, and other condiments to savour and augment the yams which her husband usually gives her. In non-farming communities, the husband had a duty to give her trading capital at the beginning of the marriage. With the profits made from this capital, she is expected to feed and clothe herself

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1. See above, Chapter VII, pp. 585-589.

and her children, and often her husband, when he is in need.

When the marriage ends in divorce, there is no right of maintenance which could continue after the divorce.[1] In most cases, the divorced wife returns to her natal family, and the land allotted to her by the husband would either be shared among the other wives or given to a new wife. For all practical purposes the marriage is ended.

In the modern Nigerian society, the traditional rule has remained unchanged in this respect, and a divorced wife has no legal right to demand maintenance from her divorced husband under customary law.[2]

The wife of a statutory marriage, at least in theory, has the common law right to be maintained by her husband, but as shall be shown later, the attitudes of High Court judges are conditioned by the customary law approach to the maintenance of a divorced wife and is typical of the following statement by Agbakoba, J., in Okala v. Okala:[3]

> I am unable to reconcile the traditional Nigerian concept of the absence or non-existence of marriage (call it dissolution) with the principle of maintenance, and it is now becoming evident in spite of statutory provisions, that contemporary judicial thought even in England is mobilizing towards a new and larger view that maintenance ought not to be ordered after a decree of dissolution save there are very strong reasons to compel a contrary course.[3]

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1. Compare the position among the Bamenda of Cameroons where the husband is entitled to claim food for subsistence from his divorced wife for as long as the dowry has not been refunded, see Kaberry, Women of the Grassfields, op. cit., p. 145.

2. Kasunmu and Salacuse, Nigerian Family Law, 1966, p. 195.

3. [1973] 3 E.C.S.L.R.67, 73; see the comments of Thompson, J., in Akinsemoyin v. Akinsemoyin [1971] N.M. L.R. 272 at 275.

B. Islamic law marriage

The rights of a wife married according to Islamic law, with reference to maintenance after divorce, are not essentially different from those of a wife married according to customary law.

During the marriage, the maintenance of the wife and children is a primary obligation of the husband.[1] When a divorce occurs, however, although the husband continues to have a legal obligation to maintain his children who are left in the custody of the wife, generally, he owes no such duty to the wife herself.

If a wife is repudiated by a revocable divorce, her husband has a legal duty to maintain her during her idda, but once the divorce becomes irrevocable, he is absolved from his legal duty to maintain her. Under classical Islamic law, if a divorced woman is pregnant, she has the right to be maintained by her husband until the birth of the child.[2] This practice is seldom followed in the Northern States, at least not in Maidugari, although the duty is recognized, and is stated to be in the interest of the unborn child. Many cases are recorded in the Social Welfare Department, of pregnant, divorced wives complaining of lack of maintenance by their former husbands, and in most cases, fathers of the unborn children.

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1. See above, Chapter IX; see also Vesey-Fitzgerald, op. cit., p. 95.

2. See Mulla, Principles of Mahomedan Law, op. cit., par.279; Bailee, Digest of Moohummudan Law, op. cit., Bk. 6, Chpt. 1, p. 450; Hamilton, Hedaya, op. cit., Vol. I, Bk. 1, Chpt. 15, pp. 145, 146; Cf. Moulvi Khan Bahadur, Mahomedan Law Relating to Marriage, Dower, Divorce, Legitimacy and Guardianship of Minors According to the Soonness, (Calcutta, Thacker Spink and Co., 1895), p. 273, 303-311; 'A woman who is observing her iddat on account of divorce is entitled to maintenance, and residence, whether there has been one divorce or (two or) three divorces, whether the woman is pregnant or not'; par. 1660, p. 303; see also Vesey-Fitzgerald, op. cit., pp. 53 and 95; 'In Maliki law the divorced wife is not entitled to maintenance except in the case where she is pregnant.'

This seems to be an example of the triumph of traditional customary law over Islamic law.[1]

C. Statutory marriage

(i) Introduction

The husband of a statutory marriage may be liable to maintain his wife after the parties have separated, or the marriage has been dissolved by divorce. The maintenance rights of the wife while the marriage still subsists has been dealt with in the last chapter.[2] This section discusses the maintenance rights when a divorce suit has been instituted, or the parties have been divorced.

The liability of a husband of a statutory marriage to maintain his wife after the breakdown of the marriage has created a degree of hostility in the Nigerian community. As previously seen, both customary and Islamic laws deny the wife the right of maintenance once the marriage has been dissolved by divorce. The right of maintenance given to the wife of a statutory marriage, especially after a divorce is therefore foreign to Nigerian customary marriage laws. While it is the subject of envy by wives married under customary or Islamic laws, it contributes to the reluctance of Nigerian men to contract marriages under the Nigerian Marriage Act.[3]

Udo Udoma, J., (as he then was), in Coker v. Coker,[4]

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1. The Syrian Law introduced a bold innovation when it provided that a wife who had been repudiated without just cause might be awarded compensation from her former husband to the maximum extent of one year's maintenance, see Coulson, Islamic Surveys, op. cit., p. 209.

2. See above, chapter XI.

3. See Stanley Childs, 'Christian Marriage in Nigeria', 16 Africa, 1946, pp. 238-246 at p. 245.

4. Suit No. WD/19/1961, unreported, Lagos High Court, 7 January 1963. See also Okafor v. Okafor [1971] Suit 0/6D/71, unreported, Onitsha High Court.

voiced the sentiment of many Nigerian men as expressed in opinions to the present writer, in the following observation:

> It is almost unprecedented in this country for a wife having divorced her husband to turn round and seek maintenance from the same husband. The very idea of maintaining a wife after divorce appears to me to be foreign to the African conception of marriage and divorce. A situation like the present cries aloud for distinct Nigerian rules.

The right of a divorced wife of a statutory marriage to maintenance, may be illusory, rather than real, and in actual fact, she may not be in a better position than the wife of an Islamic or customary law marriage, as far as maintenance after divorce is concerned. The wife's failure to get the full benefit of her right of maintenance may be due to a variety of causes, for example, the prohibitive cost of bringing an action to enforce it, or fear of inciting the hostility of a small community opposed to court actions between husband and wife. But not a little of the wife's failure to get adequate maintenance is in many cases due to the attitude of Nigerian judges to maintenance of a divorced wife, as illustrated by cases analysed below.[1]

(ii) Maintenance as an ancillary relief

Whatever may be the rights of a wife of a statutory marriage in Nigeria to enforce the payment of maintenance as a separate and independent action,[2] there is no doubt as to her right to claim maintenance as an ancilliary relief in a petition for divorce, nullity of marriage, judicial

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1. See A.B. Kasunmu, 'Economic Consequence of Divorce: A Case Study of Some Judicial Decisions in Lagos' in Law and the Family in Africa, edit. by Simon H. Roberts, (The Hague, Mouton, 1974), pp. 129-143.

2. See above, Chapter XI, pp. 226-239.

separation, restitution of conjugal rights or jactitation of marriage.

The power of the court to order the payment of maintenance to either party of the marriage may be exercised at two different stages in a matrimonial proceeding. Maintenance may be given

(i) during the pendency of the suit; and

(ii) on completion of the proceeding for the principal relief.

Before the commencement of the Matrimonial Causes Decree, 1970, payment of maintenance made before the final determination of the suit was known as alimony pendente lite (alimony pending suit). It was a temporary measure aimed at alleviating the position of a destitute wife. Permanent alimony was available after a decree of judicial separation or an order for restitution of conjugal rights.

Both these financial orders may be distinguished from maintenance which was awarded after the dissolution of a marriage. In the New Zealand case of Lodder v. Lodder,[1] Salmond J., distinguished matrimonial payments thus:

> Alimony properly so called, is the financial provision made by a husband for his wife while the marriage relation continues to exist. It is either interim or permanent alimony. Interim alimony is the provision made pendente lite, whether in a suit for divorce, judicial separation, or otherwise. Permanent alimony is the provision made after a decree of judicial separation, the parties still remaining husband and wife. Maintenance, on the other hand, as opposed to alimony, is the provision made by a man for a woman who was formerly his wife ...

The Matrimonial Causes Decree, 1970,[2] which now governs maintenance rights of spouses of a statutory marriage, does not preserve this traditional distinction in nonclamenture, and all financial orders under section 70

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1. [1923] N.Z.L.R. 786 at 788.

2. No. 18 of 1970.

are indiscriminately referred to as maintenance orders. The Courts, however, invariably adhere to the old terms.[1]

With reference to maintenance, the Decree provides that

> 'marriage' includes a purported marriage that is void, but does not include one entered into according to Muslim rites or other customary law.[2]

An order for maintenance can therefore be made in favour of, or against, parties to a statutory marriage, which is void. Reference has already been made to the anomalous position to which this provision gives rise. A party to an illegal 'marriage' under the Marriage Act may be entitled to maintenance, while the wife of a valid customary or Islamic law marriage is not.[3]

It is important to note that the Matrimonial Causes Decree, 1970, has effected complete equalization of liability to maintain between husband and wife.[4] Either spouse may be ordered to pay maintenance to the other spouse, and the 'children of the marriage'. The phrase 'children of the marriage' is widely defined and includes:

> (a) any child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
> (b) any child of the husband and wife born before the marriage whether legitimated by the marriage or not; and
> (c) any child of either the husband or wife (including an illegitimate child of either of them and a child adopted by either of them) if, at the relevant time, the child

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1. See Olu-Ibukun and Anor v. Olu-Ibukun [1974] 2 S.C.41.

2. Section 69.

3. See above, Chapter XI.

4. Cf. the position at common law and/the English Matrimonial Causes Act, 1965, applicable in Nigeria prior to the Matrimonial Causes Decree, 1970, where a husband was entitled to maintenance from his wife, only if she sought judicial separation or dissolution on the ground of the husband's insanity - section 15.

> was ordinarily a member of the household of the husband and wife.[1]

The Decree has thus made radical changes in relation to the category of children liable to be maintained by either spouse when a marriage breaks down. Whether or not one spouse has accepted the child of the other spouse as a member of the family is a question of fact.[2] Although in many cases the agreement of the spouses will be inferred from the fact that they lived together with the children as a family, in the absence of an explicit agreement, the inference from their conduct must be clear and unequivocal. A person can be deemed to have accepted a child as a member of the family only if he has full knowledge of the relevant facts at the time.[3]

In Teriba v. Teriba,[4] the petitioner claimed maintenance and custody of the children of the marriage. The paternity of all the children, except child R., was admitted by the respondent. It was proved that when R was born, the respondent paid the hospital bills, performed the naming ceremony, and treated it as his own child, until twenty-four months later when the petitioner confessed that the child belonged to another man. On the question as to whether the respondent can be said to have treated the child as a child of the marriage, Aguda, J., held:

> In my view before a child can be properly regarded as a child of the family, all material facts and circumstances relating to the child must be known to both the wife and the husband and any fraud practised by one party on the other which is in respect of some material particulars of the facts and circumstances relating to the child must vitiate the consent of the other party accepting the child as a child of the family.

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1. Matrimonial Causes Decree, 1970, S.69.
2. See Bowlas v. Bowlas [1965] 3 ALL E.R.40 C.A.[1965]P.450.
3. R. v. R. 1968, 2 ALL E.R. 608, [1968] P.414.
4. [1970] Suit No. 1/211/67, unreported decision of 27th February 1970, see S.A. Adesanya, Laws of Matrimonial Causes, 1973, p. 209.

A similar decision was given in the English case of R. v. R.[1] where a husband who believed that his wife's child was his, discovered five years later from documents he discovered, that it was not, was held not to have accepted the child as a child of the family.

But in Egwuonike v. Egwuonike,[2] where the respondent did not repudiate the child he claimed was not his for fourteen years, and gave no evidence to indicate that his knowledge of the child's alleged illegitimate status was recent, he was held to have had accepted the child as a child of the family, and was therefore liable to maintain her.

Although an order for maintenance may be made in favour of a husband as well as a wife, and a few husbands have actually claimed maintenance, there seems to be no decided case where a wife in Nigeria has been ordered to maintain her husband.[3] This is due to financial realities rather than to legal absolution. With the growing affluence of Nigerian women, the possibility of a wife being ordered to maintain her divorced husband cannot be entirely ruled out.

(iii) Quantum of maintenance

The courts have absolute discretion in determining the quantum of maintenance awarded to a spouse. The Matrimonial Causes Decree, 1970, provides that the Court, in making a maintenance order as it thinks fit shall have regard

> to the means, earning capacity and the conduct of the parties to the marriage and all other relevant circumstances.

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1. [1968] 2 ALL E.R.608; [1968] P.414; approved by Lord Denning, M.R. in Re L., [1968] 1 ALL E.R. 20, 25-26, C.A. [1968] P. 119; and by Stirling, J. in B. v. B. and F. [1968] 3 ALL E.R. 232; [1969] P.37. See also Kirkwood v. Kirkwood [1970] 2 ALL E.R. 161.

2. [1966] N.M.L.R.147; [1966] 2 ALL N.L.R.1; see also Caller v. Caller [1966] 2 ALL E.R.754; [1968] P.39.

3. See Kasunmu, 'Economic Consequences of Divorce', op. cit., p. 132.

Nigerian courts, generally, have shown reluctance to award realistic maintenance to a discarded wife, and the modern tendency seems to be to abolish maintenance of divorced wives by judicial decree. For example, in Akparanta v. Akparanta[1], Agbokoba, J., stated that

> ... the modern trend is that obligation to maintain a wife ceases with a decree of dissolution.

He refused to grant maintenance to the wife, although she was earning only £396 per annum, while the husband's salary was £2,000 per annum, and the husband himself admitted in his pleadings and evidence, that he had three children with one Bernadine, and still lived in adultery with her.

Similarly, Oputa, J., noted that section 70 of the Matrimonial Causes Decree, 1970, gives a court the discretion as to whether or not to make a maintenance order, but observed:

> Since it is the trend under the Matrimonial Causes Decree to facilitate the dissolution of marriages, a wife/petitioner eager to have all links with her husband broken should not keep alive any financial link with a man she no longer regards as her husband, a man who no longer owes her any marital obligations including the obligation to maintain.
>
> Why should there not be a complete dissolution, including the dissolution of all erstwhile financial bonds and obligations?[2]

A similar attitude was portrayed by Ogbobine, J., who, after awarding the wife/petitioner in Achugbue v. Achugbue,[3]

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1. [1972] 1 E.C.S.L.R.779 at p. 789.
2. Okafor v. Okafor [1970] Suit No.E/14D/70, unreported decision of Enugu High Court.
3. [1971] Suit No. UHC/21/70, unreported decision of Ughelli High Court, 26 November 1971; see also Adeleye v. Adeleye [1974] 6 C.C.H.C.J.827. Contrast David v. David [1958] L.L.R. 85; Dawodu v. Dawodu [1974] 5 C.C.H.C.J.617; maintenance does not only mean the food a wife puts in her mouth ... It does not mean mere subsistance. William v. William [1976] 3 C.C.H.C.J.805. Contrast Somorin v. Somorin [1974] 5 C.C.H.C.J. 613; and Re Borthwick 1949 1 ALL E.R. 427 at 475. 'Maintenance cannot mean mere subsistence'; and Hakluytt v. Hakluytt [1968] 2 ALL E.R.868.

the paltry sum of £2 per month, added that its payment was to cease 'if she remarried, lived with any other man, or had a child by any other man'.

Account is rarely taken of the conduct of the parties to the marriage as directed by the Decree, when considering the level of maintenance. The decisions are often conflicting and show no consistent pattern, but a few cases will amply illustrate the general attitude. For example, the Decree, as well as the old law, enjoins the court to have regard to the conduct of the parties to the marriage.[1] In many cases, so far as the conduct of the man is concerned, this element is disregarded.

In Anaje v. Anaje,[2] the wife sued for a decree of judicial separation on the ground that the husband brought another woman into the matrimonial home who could get male issues for him, since she had only one girl. Her counsel asked for one-third of the respondent husband's earnings of £1,500 per annum, as permanent alimony, and cited authorities to show that she was entitled to it. Kaine, J., said:

> I am of opinion that it is difficult to apply this principle to many African homes. I do not think that the African woman is so expensive to warrant it.
> It is even in the interest of the African woman that such a heavy amount should not be paid to her because she is living in a society where the relations and kinsmen of the husband have not learned to mind their own business.

He awarded the wife £12.10 per month for her maintenance and £5 per month for the maintenance of the only child of the marriage. No mention was made as to the relevance of the conduct of the husband in regard to the amount awarded. Kaine, J.'s statement above can be compared with that of Barry, J., in the Australian case of Davis v. Davis and

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1. See section 70(1).
2. [1965] Suit No. 0/9D/1963, unreported decision of Onitsha High Court decided on the 20th September, 1965.

Wissing.[1]

> ... if a man of means irretrievably destroys the reality of a marriage, and it appears that he contemplates marriage with another woman whom he prefers to his wife, the court should ensure that he pays to the spouse he is repudiating whatever, having in regard to his means and his conduct towards her, and her conduct towards him, is fair, and reasonable, recognizing that he is pursuing his own gratification in disregard of the obligations he undertook.[2]

It is not suggested that a wife should be enriched by the immoral or perfidous conduct of the husband, but there is no reason why she should be at a disadvantage either because of it.

A similar disregard of the husband's conduct is evident in the case of Ehigiator v. Ehigiator,[3] where the parties having lived together for many years as husband and wife, got legally married under the Marriage Act in 1958. There were four children of the marriage before the husband left in 1959 for the United Kingdom to further his studies. Before he left Nigeria, his salary as a Grade 2 teacher was £19.10 a month. He worked in England to pay for his education, but occasionally remitted money home to his wife for maintenance. On his return home, he drove the wife away from the matrimonial home, because he was in love with an English woman he had brought home with him. He consistently refused to take the wife back, in spite of all her pleadings, although he could find no fault with her. His salary on his return was £804 per annum. The Judge found that the respondent was guilty of wilful neglect, adultery, and desertion, and that for no just cause he wilfully neglected to provide reasonable maintenance for his

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1. [1963] 5 F.L.R.388.

2. Ibid., p. 392.

3. [1966] N.M.L.R. 372; [1966] 2 ALL N.L.R. 169.

wife. In deciding what was reasonable maintenance to which the deserted wife was entitled, Begho, J., said:

> What is reasonable maintenance for the wife must be interpreted against the background of the standard of life which the husband previously maintained before he and the wife parted. Since the return of the husband from the United Kingdom he has not lived with the wife to give her what is generally referred to as 'senior service' standard. What the court can consider reasonable or adequate is the amount of money which today can give her the same standard of life she was used to when the husband was a Grade 2 teacher earning £19.10 a month in 1959, before he went to the United Kingdom.[1]

What would have been the wife's standard of living had the husband not deserted her should have been a pertinent consideration. In the English case of Le Roy-Lewis v. Le Roy-Lewis,[2] an increase in the husband's income since the parties ceased cohabitation was regarded as relevant if the wife would have reaped the benefit of them had the spouses still been living together.

Although no account was taken of the husband's conduct in awarding maintenance to the wife in the above case in Akparanta v. Akparanta,[3] a wife was deprived of alimony pendente lite, because of her alleged adultery. This case may be compared with the attitude of the English courts as exemplified in Wachtel v. Wachtel,[4] where the wife deserted her husband, and admitted she had formed a relationship with a member of the opposite sex, although she denied adultery. Nevertheless, she was awarded £1,500 maintenance and £6,000

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1. Ehigiator v. Ehigiator [1966] N.M.L.R.372 at p.377; [1966] 2 ALL. N.L.R. 169 at p. 177.
2. [1954] 3 ALL E.R.57; [1955] P.1.
3. [1970-1971] E.C.S.L.R. 104; see also Arinoye v. Arinoye [1972] 3 C.C.H.C.J. 146; Oseni v. Oseni [1972] C.C.H.C.J. 110.
4. [1973] 1 ALL E.R. 829, C.A.; [1973] Fam. 72; see also Harnett v. Harnett [1973] 2 ALL E.R. 593.

lump sum, representing nearly one-third of the matrimonial home.

6. Summary

The matrimonial property regime which predominates in Nigeria is the separate property regime.

Married women in most systems of customary law have full legal capacity to acquire, own, and dispose of all types of property, including land. Their husbands have no legal rights to control the disposal of property to which the wives are absolutely entitled, either during the marriage, or when there is a divorce. The earnings of a wife, in these societies, are also subject to no restrictions by the husband, and belong to the wife entirely.

Women married under Islamic law also have full legal capacity to own property separately from their husbands, but a husband has the legal right to control his wife's disposal of two-thirds of her separate property, although this right is seldomly enforced in the Nigerian Islamic communities.

In a few societies, women married under customary law are denied the right to own movable property, and more often, cannot own land. In some cases, although they can own land or other property, the right of control or disposal of such property resides in the husband during the continuance of the marriage. When there is a divorce, the husband is legally entitled to claim all, or some, of his wife's separate property. She has no claim on any of his separate property property to which she may have made financial contributions, but legal ownership of which is vested in his name.

Under the Married Women's Property Acts, a married woman is capable of acquiring holding, and disposing of her separate property, without the intervention of anyone, including her husband, during the marriage, or after a divorce. The Statutes apply to all wives of a statutory marriage, as well as to wives of a customary or Islamic law marriage, where the customary or Islamic law is inconsistent with the provisions of the statute. The Married Women's Property Acts do not apply to the Western or Mid-Western States. In those States, an almost identical

statute to the Married Women's Property Act 1882, has been locally enacted, but this local statute does not apply to wives of a customary or Islamic law marriage.

Where property is jointly owned by the spouses, either husband or wife may apply under the Married Women's Property Act, 1882, for an order to enforce his or her proprietory rights. This does not apply to spouses married under customary or Islamic law in the Western of Mid-Western States.

The wife of a customary marriage has no legal right to remain in a matrimonial home provided for her use by her husband when a divorce ensues, nor is she entitled to be maintained by her husband after the divorce, or when the parties have separated because of a disagreement. On the other hand, the wife has no legal obligation to provide her husband with food or any other help which she may have given to him during the marriage, once the marriage has broken down irretrievably.

The divorced wife of an Islamic law marriage has no legal right to remain in her husband's home, or to be maintained by him, once the period of idda has been observed.

The wife of a statutory marriage may have the right to remain in the matrimonial home, even where it is solely owned by her husband, unless he has made adequate alternative provision for her. She also has the right to be maintained by him after a divorce. She has a corresponding duty to maintain her husband, after a divorce, in appropriate circumstances.

Because of the attitude of most Nigerian judges to maintenance of a divorced wife, the right of a divorced wife to be maintained by her husband is more apparent than real, and in actual fact the wife of a statutory marriage may be no better off than the wife of an Islamic or customary law marriage once a divorce occurs, as far as maintenance rights are concerned.[1]

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1. See e.g. Arinye v. Arinye [1973] 4 C.C.H.C.J. 81, at p. 87; Akinsemoyin v. Akinsemoyin [1971] N.M.L.R. 272 at 275; Odulata v. Odulata [1970] Suit No. AB/20/JO, unreported, cited in Akinsemoyin v. Akinsemoyin: 'A lady who earns £1,032 per annum should be able to maintain herself'.

CHAPTER XIII

Rights of Succession

"Of him whose wife is not deceased, half the body survives. How then should another take his property when half of his person is alive".[1]

1. Introduction

The rule that a widow does not inherit her deceased husband's property obtained, not only in Hindu law as the above quotation from the Laws of Manu indicates, but in other traditional societies in many parts of the world. The right of succession in a deceased husband's property is one of the most important aspects of the legal status of married women, especially in African customary law marriage where the traditional rule still applies, and a widow is deprived of the rights to inherit her deceased husband's intestate estate.

In Nigeria, intestate succession to the estate of a married person generally depends on the type of marriage he or she has contracted. The intestate estate of Nigerians who are subject to customary law is governed by the customary law which pertains to his particular community. If the intestate contracted a customary marriage only, in the case of the husband, his customary law continues to govern the devolution of his property, but the devolution of a married woman's property, provided a customary marriage only is contracted, is governed by the customary law of her husband's community, in most cases.

In the Northern Emirates, the intestate estates of Moslems, at least in theory, are governed by Islamic law, which as far as the widow's rights of inheritance are concerned, are basically different, and as shall be seen, more beneficial to women.

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1. Manu: Dayabhaga, Chapter XI, sect. 1, verse 130, as quoted by Markby, Elements of Law, op.cit.,p.375.

If, however, the deceased, and in some cases even his parents, contracted a statutory marriage, his or her intestate estate is governed, not by customary or Islamic laws, but by the general law which is derived from the English laws of succession.

The principles as set out above are reasonably clear, but complications arise because, as previously noted, many spouses combine a customary marriage with a statutory marriage, and the rules governing the conflict of laws produced as a result are far from clear.[1] It is therefore very difficult to ascertain precisely the rules which govern any particular case.

Laws of intestate succession to the estate of a deceased husband in almost all system of customary law, contrary to the principles of the general law which favours the wife and children of the deceased, deprive the widow, and, in a few cases, especially in matrilineal communities, even the children of the marriage.[2] Under Islamic law, the wife or wives and children of the deceased get specified shares in the deceased's estate, but the share of the widow, in most cases, is less than it would be under the general law. Consequently, there is a conflict in the rules governing the different types of marriages, with the widow of a customary marriage faring less well than her counterparts married according to Islamic law or under statutory law. As noted previously, the problem is further complicated by the fact that many Nigerians who contract a

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1. See above, Chapter XI.

2. See Okoro, The Customary Laws of Succession in Eastern Nigeria, op.cit.,pp.160-167; Daryll Forde, "Double Descent Among the Yako", in African Systems of Kinship and Marriage, edit. by A.R. Radcliffe-Brown and Daryll Forde op.cit.,pp.310-311; "sons should expect very little from their parents. A man may obtain a gun or cutlass that was his father's; the rest will be claimed by his father's brother or sister's son. See also Nsugbe, Ohaffia: A Matrilineal Ibo People,op.cit., pp.86-94; See Meek, Land Tenure and Land Administration in Nigeria and the Cameroons, op.cit., p.179, for details of matrilineal communities in the Northern State of Nigeria, and their laws of succession.

statutory marriage also contract a customary marriage. The rules governing succession in such cases are far from clear, and judicial decisions have added further to the complication, as will be apparent from the discussion, with conflicting judgments upon similar facts.

Conflict of laws also exists with reference to the rules of testate succession, due to the fact that under the general law, the testator has unrestricted rights to dispose of all individually owned property which he possessed at the time of his death, while under customary and Islamic laws, his capacity in this respect is subject to various restrictions.

The uncertainty produced by these conflicts of laws are of vital importance to the status of women.

Succession may conveniently be discussed under the following headings:

(1) intestate succession in each type of marriage;
(11) testate succession;
(111) the problems created by the conflict of laws;
(1V) the widow's right to letters of administration

2. Intestate Succession

A. Customary marriage

The estate of a Nigerian who dies intestate subject to customary law, and who has contracted a customary marriage only, is governed by the customary rules of succession applicable in his particular community.

The rules of intestate succession under Nigerian customary systems have almost as many variations as there are ethnic groups in the country, and variations within the same ethnic group, especially among the Igbos, are quite common.[1] For example, many societies, such as, the

1. See Nwakamma Okoro, "Integration of the Customary and the General (English) Laws of Succession in Eastern Nigeria", in Integration of Customary and Modern Legal Systems in Africa, University of Ife, Institute of African Studies (Ile-Ife, Nigeria, Africana Publishing Corporation, 1971), pp.243-257 at p.242; see also Mudiaga Odje, Laws of Succession in Southern Nigeria with Special Reference to the Mid-Western Region, Ph.D. dissertation, University of London, 1965, p.20.

Yoruba and Efik, grant inheritance rights in all types of property to male and female children of the deceased, to the exclusion of other blood relations.[1] In other societies, certain blood relations share with the deceased's children.[2] In most communities, female children are excluded from inheritance rights in their deceased fathers' estates,[3] all property, especially immovable property, being given to males only.[4] In yet other societies, the eldest male child alone inherits, although he usually has the obligation to cater for the needs of younger siblings.[5] From these rules, it can be seen that there is no common practice with regard to customary laws of succession in Nigeria.

The only universal rule which, almost without any exceptions, obtains in the Nigerian customary laws of succession is that a wife does not inherit her deceased husband's intestate estate.[6] It is remarkable to find such uniformity in the customary laws of so many peoples with different origins, histories and customs. Indeed the

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1. See e.g. Oso v. Ikusedun [1976] 4 C.C.H.C.J.1113; Taiwo v. Lawani and Anor.[1961] 1 All N.L.R. 703; Salami v. Salami [1957] W.R.N.L.R.10; Adeseye v. Taiwo [1956] 1 F.S.C.84; Sule and Ors.v. Ajisegiri [1937] 13 N.L.R. 146. This rule also applies among some matrilineal societies e.g. Ohaffia, see Nsugbe, op.cit.,pp.88; Customary Law Manual, 1977, op.cit.,p.105, par.160(b).

2. See Forde, Peoples of the Niger-Benue Confluence, op. cit.,p.65, among the Igbirra of Okene, succession is by a younger full brother, unless the deceased's eldest son is senior to him; see also Fadipe, The Sociology of the Yorubas, op.cit.,pp.140-141.

3. See e.g. among the Igbos, Customary Law Manual, op.cit., p.103; Uboma v. Ibeneme [1967] F.N.L.R., 251; Nwauwa v. Ugorji and Anor.[1965] Suit No. HOW/68/63, unreported, Owerri High Court, 25 Sept. 1965, where it was held that daughters are not entitled to inherit their father's land except that given to them by him during his life-time; see also Meek, Northern Tribes of Nigeria, op.cit., pp.282-283; Uboma and Ors.v. Ibeneme and Anor.[1967] F.N.L.R. 251.

4. See Customary Law Manual, op.cit.,pp.100-101. This is the general rule among the Igbos, but there are exceptions.

Footnotes 5 and 6 continued.....

exclusion of a widow from direct inheritance rights (as opposed to rights of inheritance through her children) in her deceased husband's property is found in many other traditional societies elsewhere in Africa.[1]

In Nigeria, the rule applies irrespective of the services the widow may have rendered to her deceased husband, or of her contributions, financial or otherwise to the accumulation of his property.

Footnotes 5 and 6 continued....

5. See e.g. Benin customary law; Ogiamien v. Ogiamien [1967] N.M.L.R. 245; Ehigie v. Ehighie [1961] All N.L.R.843; no child other than the eldest surviving male child of a deceased intestate who has duly performed the burial ceremony has the right to inherit; in the absence of male issues the right passes to female issues. See R.A.I. Ogbobine, Material and Cases on Benin Land Law (Benin City, 1974); see also Bradbury and Lloyd, The Benin Kingdom, op.cit.,pp.46-47; Among the Ibibios generally, the eldest son also inherits to the exclusion of other children, see Forde and Jones, op.cit.,p.75; cf. Ejiamike v. Ejiamike [1972] 2 E.C.S.L.R.11; and Ngwo and Nwodei v. Onyejena [1965] 1 All N.L.R. 352.

6. See L.E.D.B.v.Tukuru and Ors.[1963] L.L.R. 155; Seberu v. Sunmonu,[1957] 2 F.S.C.33; see also Ward Price, Land Tenure in the Yoruba Provinces, op.cit.,p.15; Customary Law Manual, op.cit.,p.112; cf. Nwugege v. Adigwe and Anor. [1934] 11 N.L.R.134, where it was held that on the death of a married woman, movable ante-nuptial property brought to the husband's home, as well as property acquired subsequently by a married woman, after her death is inherited by her husband or his family. Cf. the position among the Yoruba - Johnson and Ors. v. Macauley and Anor. [1961] 1 All N.L.R. 743; see further, Nwabueze, op.cit., pp.389-392; Odje, Law of Succession in Southern Nigeria, op.cit.,p.291; Roth, Great Benin, op.cit., p.97; Egharevba, Benin Law and Custom, op.cit.,pp.38 and 76; Esenwa, "Marriage Customs in Asaba District" op.cit.,p.80

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1. See e.g. Ghana matrilineal societies where persons trace descent in the direct female line from a common remote ancestress: Amarfio v. Ayorkor [1954] 14 W.A.C.A.554, wives do not inherit from their husbands; see Bosman, op.cit.,p.202 "On the death of either man or wife the respective relations come and immediately sweep away all, not leaving the widow or widower the least part thereof..."; cf. N.A. Ollenu, "The Law of Succession in Ghana", in Integration of Customary and Modern Legal Systems in Africa, op.cit., pp.294-310 at p.302. See also H.F. Morris, "The Law of Succession in Uganda", in Integration of Customary and Modern Legal Systems in Africa, op.cit.,pp.310-325, at p.313, but note the recent developments in regard to succession, see Report of the

footnote 1 continued.....

The position of the Nigerian widow in this respect, is not unlike the position of the English wife who, because of the present English doctrine of separate property, is prevented from taking any share in her divorced husband's property. Lord Simon of Glaisdale summed up the position of the latter thus:

> "The cock can feather the nest because he does not have to spend most of his time sitting on it. In the generality of marriages the wife bears and rears children and minds the home. She thereby frees her husband for his economic activities. Since it is her performance of her function which enables the husband to perform his, she is in justice entitled to share in its fruits".[1]

Customary law gives no part of the deceased husband's estate to his widow, despite the fact that, unlike the average English wife who seldomly undertakes paid employment, especially when the children are young, the contributions of the Nigerian wife to the marital relationship invariably extend far beyond her domestic and child-bearing services.

In the former Western House of Assembly in 1950, the Member of Ijebu Province, speaking on a: "Proposed Scheme to Provide Pensions for Widows and Orphans of African Officers", is reported as saying:

> "What I wish to say is that in African society as it stands today, there is hardly any woman that can be called a widow in the ordinary sense, because as soon as the officer dies, she either goes to the brother or one of the relatives of the officer, or she goes to another husband. In that case she is going to be chased, and the usual dowry collected from her. I do not think that any Native Court has ever decreed that part of the property of a deceased man should go to his wife. It is not done here, and so I quite agree that if any benefit is going to be enjoyed at all it should be passed

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Footnote 1 continued....Commission on Marriage, Divorce and the Status of Women, (Government Printer, Entebbe, 1965); see also H.F. Morris, "Uganda: Report of the Commission on Marriage, Divorce and the Status of Women" [1966] J.A.L. pp.3-7; Taylor, op.cit.,p.228.

1. Sir Simon of Glaisdale, in an address given to The Law Society [1965] 62 Law Society Gazette, 345, "With All My Worldly Goods", as quoted by Lord Denning in Wachtel v. Wachtel [1973] 2 W.L.R.366 at p.374, see also Pettitt v. Pettitt [1969] 2 W.L.R. 966 at 987; [1970] A.C.777 at p.881, per Lord Hodson.

> to the children of the deceased. If a man dies, and leaves no will, or there is disagreement about the will, his property is shared among his children and relatives. I do not think it is ever shared with any wife or wives, so I join with those who say that the property of the deceased officer should go to the children and not to the wives".[1]

This opinion expresses the general position of a widow in customary law.[2] The principle has been upheld in numerous court decisions, and in Oshilaja v. Oshilaja,[3] Odesanya, J., noted:

> "The customary law that a widow cannot inherit her deceased husband's property has become so notorious by frequent proof in the courts that it has become judicially noticeable".

It is submitted that the exclusion of widows from inheritance rights in their deceased husband's property is the greatest injustice in which women married according to customary law are now subject. The degree of injustice is heightened by the fact that in some societies it is alleged that all the property of a married woman legally belongs to her husband. In strict law, therefore, on the death of her husband, her property belongs to his inheritors in such communities.[4]

Various reasons have been advanced for the exclusion of widows from inheritance rights in their deceased husband's intestate estates.

Berkeley, J., in Sogunro-Davies v. Sogunro and Ors.[5] opined that a wife was deprived of inheritance rights in her deceased husband's estate because:

> "in an intestacy under native law and custom, the devolution of property follows the blood. Therefore a wife or widow, not being of the blood has no claim to any share".

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1. Report of Debate, Western House of Assembly, 16 December, 1950; see C.W. Rowling, Land Tenure in Ijebu Province (Government Printer, Western Region, Nigeria, 1956), p.38.
2. See generally, Nwogugu, Family Law in Nigeria, op.cit., p.313; Suberu v. Sunmonu, [1957] 2 F.S.C.33; Nezianya and Anor.v. Okagbue and Ors.[1963] 1 All N.L.R.352; Bascom, The Yoruba of Southwestern Nigeria, op.cit., p.46; Fadipe, op.cit., p.143; Nwabueze, op.cit., pp.389-392; L.E.D.B. v.Tukuru [1963] L.L.R.155.
3. [1972] 10 C.C.H.C.J. 11 at p.16.
4. [1929] 9 N.L.R. 79 at p.80.

Footnote 5 continued.....

It is respectfully submitted that this reason is untenable. In most societies in Nigeria, a husband inherits the property of his deceased wife when there are no surviving children,[1] and in some societies, he interits even when there are surviving children of the deceased wife.[2] Yet in those societies, his wife does not inherit from him.[3]

Nwabueze admits that inheritance of a wife's property by her husband in default of issue contradicts the general principle that devolution follows the blood, but he submits that the inconsistency is explained by the fact that marriage has the effect of transferring the wife to the husband's patrilineage by virtue of the dowry paid on her.[4] As Anderson points out in another context, "what is sauce for the goose is sauce for the gander";[5] if her transfer to

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Footnote 5 continued.....

5. [1929] 9 N.L.R.79, at p.80; see also Nwabueze, Nigerian Land Law, op.cit.,p.391; Odje, Law of Succession in Southern Nigeria, op.cit.,p.270.

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1. e.g. in Aba, Abakaliki, Arochukwu, Orlu and many other Divisions in Imo and Anambra States, a married woman's house, failing sons,is inherited by her husband, see Customary Law Manual, op.cit.,p.161, par.237(1)(a); see also Nwabueze, Nigerian Land Law, op.cit.,p.391; see Nwugege v. Adigwe [1934] 11 N.L.R. 134, in relation to ante-nuptial property.
2. In Onitsha, Udi, Mbano, Nkwerre, Enugu and other Divisions in Anambra and Imo States, a married woman's house is inherited by her husband exclusively, see Customary Law Manual, op.cit.,p.161, par.237(1)(b); Meek, Northern Tribes of Nigeria, op.cit.,p.283; Talbot, Peoples of Southern Nigeria, op.cit.,p.685; Nwogugu, Family Law in Nigeria, op.cit.,pp.313-314.
3. See Nezianya and Anor. v. Okagbue and Anor.[1963] 1 All N.L.R. 352.
4. See Nwabueze, op.cit.,p.391.
5. J.N.D. Anderson, "Islamic Law in Africa; Problems of Today and Tomorrow" in Changing Law in Developing Countries, edit. by J.N.D. Anderson, 1968), p.174.

his patrilineage allows the husband to inherit from his wife, then by virtue of such a transfer, she should be allowed to inherit from him.

The fact is that there are many cases where persons, unrelated by blood ties, are allowed to inherit in customary law. For example, in some communities, a stranger who performs the burial rites of a deceased person is entitled to inherit from him. This is expressed in the Ishan (Edo) maxim.

"Ono to Olinmin ole yan Uwa" which means "He who performs the burial ceremonies owns the house and all therein.[1] An adopted son is also entitled to inherit from his adopted father in many communities.[2] Slaves could also inherit.[3] Moreover, many husbands and wives are related by blood.[4] Nevertheless, the widows in such cases are also prevented from inheriting their deceased husbands' property.

The true reason for the rule that wives do not inherit their husband's property must be sought elsewhere. In Suberu v. Sunmonu,[5] Jibowu, F.J., rejected the decision of the Lagos High Court which awarded the property of a deceased husband to his two surviving widows. The learned Judge said of the judgment in the lower court:

> "His judgment in favour of the widows could not be supported even by Counsel for the plaintiffs as it is a well settled rule of native law and custom of the Yoruba people that a wife could not inherit her husband's property since she herself is, like a chatel [sic] to be inherited by a relative of her late husband".[6]

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1. Mudiaga Odje, Law of Succession in Southern Nigeria, op.cit.,p.163; see also Meek, Law and Authority, op.cit., p.320, a similar rule operates among Awgu (Igbo) community.
2. Onwuka and Anor.v. The Abiriba Clan Council [1936] 1 E.R.N.L.R.17; Re Alayo v. Tunwase,[1946] 18 N.L.R.88.
3. See Dabiri v. Gbajumo [1961] 1 All N.L.R.225; Alaka v. Alaka and Anor.[1904] 1 N.L.R.55; Nwabueze, op.cit., pp.171-174.
4. See further, Chapter V, pp.408-411.
5. [1957] 2 F.S.C.33.
6. Ibid., p.34.

It is thus in the context of the law of succession that the remarkable idea is raised that married women are themselves items of property: yet this idea is a popular one in Nigeria. Indeed, some writers attempt to classify married women. Thus Coker classifies them as immovable property:

> "...among the Yorubas of Nigeria, the wives of a man also constitute part of his immovable property, and the fact that they continue to be attached to the family even after his death demonstrates clearly that they are part of his immovable property. They are of course a type of property that could only be inherited by the male members of the family".[1]

Basden, on the other hand, classifies married women as "personal property",[2] and Lloyd puts them into the category of "self-acquired property".[3]

However, the notion that wives are a category of property is legally insupportable for the following reasons:

(a) as far as the evidence shows, in Nigerian customary laws, a husband never had that freedom of disposal over his wife which, as seen previously, is the real essence of ownership. He could not kill,[4] or sell her with impunity. He could not marry her to anyone else. It is therefore evident that the essential legal element of ownership was absent in the husband and wife relationship;[5]

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1. G.B.A. Coker, Family Property Among the Yorubas, 2nd edit., (London: Sweet and Maxwell, 1966), p.39.
2. Basden, Among the Ibos of Nigeria, op.cit.,p.32; Meek, Law and Authority in a Nigerian Tribe, op.cit.,p.323; Nwugege v. Adigwe and Anor.[1934] 11 N.L.R. 134.
3. Lloyd, Yoruba Land Law,1962, reprint 1964, p.295; see also A.B. Ellis, West African Sketches,1881, p.40, who places women in the same category as houses, goods, etc; and Mary Kingsley who states that "women and slaves constitute the wealth of an African"; Mary Kingsley, West African Studies, op.cit.,p.438; Tremearne, op.cit.,p.236.
4. See e.g. Talbot, Tribes of the Niger Delta, op.cit.,p.297; "A husband who killed his wife was guilty of murder, but not, according to the statement made to me, a woman who killed her husband".
5. See further, above; Chapter VI, p.500.

(b) a wife is not permanently attached to her husband. No law compels her to remain with him. She could desert him whenever she wished to do so. The husband's only legal remedy was a right to a refund of dowry paid in respect of his marriage to her;

(c) similarly, a widow is not permanently attached to her deceased husband's family. Jobowu, F.J., admitted that "a widow who does not wish to be inherited, could free herself from that obligation by refunding the dowry paid on her to her late husband's family".[1] As Odje correctly notes, "the heir of the husband has no proprietary right over the widow. His right in this connection cannot be put any higher than that he is entitled to take her as wife provided she gives her consent and blessing to his proposal".[2] The heir may be entitled to a refund of dowry if the widow exercises her option and refuses to marry any member of his family;[3]

(d) a wife is a person in law. African tradition imposed a position of subordination on the wife, but she was not devoid of legal rights: She also had legal obligations, which show that she was a legal person and not a res,- an item of property;

(e) Yoruba women always had the legal capacity to own nearly all types of property which could be owned by their male counterparts.[4] This capacity for ownership obviously refutes any suggestion that they are items of property, since if it were otherwise, the ridiculous situation in which "property owns property" would exist.

Obi correctly submits that an "Ibo wife is not a chattel and never has been".[5] It is respectfully submitted that the Yoruba wife, or any other Nigerian wife is not

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1. Suberu v. Sunmonu [1957] 2 F.S.C.33, at p.34; see also Meek, Law and Authority..., op.cit. p.321.
2. See Odje, op.cit.,p.269.
3. Meek, Law and Authority...,op.cit.,pp.320-321.
4. See above, Chapter XII, pp.349-352.
5. Obi, Ibo Law and Property, op.cit.,p.186.

treated by customary law as property, and should not be classified as such.

The third reason advanced for widows being excluded from inheriting any part of their deceased husband's estate is that a widow is inherited by a member of the deceased husband's family, and thus all her needs are catered for - the so-called doctrine of "widow-inheritance". This institution has been referred to previously,[1] but it is probably necessary here to describe its operation in the modern society.

(1) "Marriage by Succession"("widow-inheritance")

The term "widow inheritance" has been adopted by Europeans and others to describe the process whereby the widow of a deceased husband marries a member of his family - in most cases his son, brother, or other male relative. The term "widow-inheritance" is a misnomer, since as shown above,[2] the widow is not a chattel, and cannot be inherited. What the deceased husband's heir inherits is some of the rights arising from the payment of dowry in respect of the widow, by the deceased husband. By virtue of his inheritance of these rights, the deceased husband's heir has a right to be considered as a prospective husband of the widow. The widow has an option to choose the member of her deceased husband's family she wishes to marry her, subject to his consent, or to marry a non-member of the family. If the latter option is exercised, the deceased's heir has a right to claim a refund of the dowry paid in respect of the widow with reference to her marriage to the deceased.[3] This is the sum total of the inheritance rights of the deceased's heir with regard to the widow.

Although the system of marriage by succession, or "widow-inheritance" obtains in many Nigerian communities,

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1. See above, Chapters III and VIII.
2. See further, Chapter VIII, pp. 682-685.
3. See Meek, Law and Authority, op.cit., p.323; Laromeke v. Nekegho and Anor.[1958] 3 W.A.L.R. 306.

it is by no means universal. Ames, J., in Re Estate of Agboruja,[1] 1949, regarded the system as a sort of African economy for providing maintenance for the widow on the death of her husband, and as such he was of the opinion that it was equitable and fair "where those who follow the custom are pagans and not Mohammedans or Christians". The learned Judge was obviously impressed by the fact that the custom was allegedly widespread.[2] Undoubtedly the exigencies of life in traditional societies made such a system desirable. It ensured that most widows had a reasonable certainty of entering into a recognized marital union. Their interests were probably best secured in traditional society by placing them under the protection of a son or other male relative. Romantic love was not a prominent feature of traditional marriages, and there is evidence that such marriages were quite successful in the past.

A particular example of one such happy marriage was recorded in Onitsha during field-work. The surviving widower was an old man. Several other interviewees had mentioned him as an example of a man who had married his father's wife. It was not quite clear whether his father had actually lived with the girl before his death. The widower, when interviewed, seemed rather sensitive about this fact, and the point was not pressed. It was admitted by all concerned, however, that the girl whom he had married had previously been his father's wife, and that he married her after the father's death. They lived together very happily for more than forty years, and had many children. The wife had died ten years previously, and his children were anxious for him to remarry in order to secure someone to care for him in his old age. The widower, however, refused

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1. [1949] 19 N.L.R. 38; cf. Laromeke v. Nekegho and Anor. [1958] 3 W.A.L.R. 306; see further Chapter II, p.184.
2. Elias, Nigerian Land Law, 4th edit., 1971, op.cit.,p.195; cf. Manu, who declares that the levirate, an analogious system "is only fit for cattle"; see Maine, Dissertations on Early Law and Custom, op.cit.,pp.100-108; Bowen, Central Africa, op.cit., p.305.

to remarry, because of his love for the dead wife. The couple had had such a perfect relationship that the old man refused to replace her.

Most of the evidence collected, however, points to the fact that the system as it operated in traditional society, has now broken down. There are many young men today who are willing to take the beneficial assets of the deceased, but who refuse to shoulder the responsibilities. Not many educated men who inherit their brother's or father's property would be prepared to marry his illiterate wife or to maintain his children. If the wife is fairly young (and after the Nigerian Civil War there are many young widows), she will need, not only certain incidents of marriage, for example, maintenance, but also physical love, and the feeling that she is accepted fully as a wife.

The late Justice Ibekwe, former Solicitor-General of the Federation of Nigeria, in a lecture delivered in Nsukka in 1974, said:

> "the system had provided cohesion and integration within the various communities where it applied, and was the most stabilizing factor in those communities, helping to keep the family blood pure and intact".

He, however, admitted that there were many Nigerians who now find it difficult to appreciate this rule of customary law of succession:

> "To be frank, I should loathe to think that anyone would ever call upon me to inherit any of my father's wives, even if I were the eldest male in the family. And I do not think I am an exception in this regard. Who, in this audience, would like to inherit his father's or his brother's wife? I can almost hear some of you saying 'God forbid'".[1]

Nobody in the predominently male audience indicated that they would be willing. In many cases, even where they are willing, they may be legally incapable of doing so, since they may have already contracted a statutory marriage.[2]

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1. Dan O. Ibekwe, "Conflict of Cultures and Our Customary Law, in African Indigenous Laws, edit. by J.O. Elias, et.al., op.cit., p.305.

2. See above, Chapter X, pp.133-140.

The result is, that many widows who should have been married by members of their deceased husbands' families remain unmarried. Consequently, they are deprived of the right to inherit their husband's property, and yet they cannot compel the heirs to marry them, or provide for their maintenance out of the property. In many cases, especially in the urban areas where the sale of land and houses has now become commonplace, they are even deprived of a home.

Obi asserts that with regard to the family house (obi) among the Igbos, "unless the heir ultimately gets married to the widow he cannot go into possession till the widow has died or otherwise ceased to be the deceased's widow".[1] This rule does not apply in many Igbo societies.[2] The Customary Law Manual states:

> "A widow, even if she has no son, has a right to live as a member of the family in her late husband's compound till she remarries or dies. But the family has power to remove her for persistent bad conduct".[3]

This seems another way of saying that the widow's right to occupy her deceased husband's house is dependent on her ability to gain the goodwill of his heirs. A similar anomalous statement was made in Nezianya and Anor. v. Okagbue and Ors.[4] in relation to the right of a widow in Onitsha customary law where it was said:

> "It would appear that the essence of possession of the wife in such a case is that she occupies the property or deals with it as a recognized member of her husband's family and not as a stranger; nor does she need express consent or permission of the family to occupy the property so long as the family made no objection to her occupation".

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1. Obi, Ibo Law of Property, op.cit., p.173; see also R.W. James, Modern Land Law in Nigeria (Ile-Ife, Nigeria: University of Ife Press, 1973), p.48.
2. See Customary Law Manual, op.cit., p.148 for exceptions to this rule.
3. Customary Law Manual, op.cit., p.148, par.225(1); see also Nwogugu, Family Law in Nigeria, op.cit., p.313.
4. [1963] 1 All N.L.R. 352.

The confusion is further reinforced by the additional statement that

> "The widow has a right to occupy the building or part of it, but this is subject to good behaviour".

If the widow has the legal right of occupation, it is difficult to see why this legal right should be subject to any objections made by the deceased husband's family or to their opinions of her good behaviour.[1]

(11) A widow's right of maintenance

A widow's right of maintenance by her husband's successor is similarly uncertain. Okoro asserts that her late husband's successors are obliged in law to maintain her.[2] Certain questions, however, arise. For example, if she is not married to any member of the deceased's family, and several members succeed to his property, who is responsible for her maintenance? Is her maintenance to be borne by them equally? If not, in what proportion is it to be borne? What is the level of maintenance to which she is entitled? Must the level depend on the successor's economic position, or that of her own husband? The difference can be very great in these modern days. Is the right of maintenance dependent on the amount of property left by the deceased, or is the successor obliged to maintain the widow or widows out of his own resources? If the deceased left many widows, but little property, this would result in an unreasonable burden being placed on his successor. All these questions are largely unresolved.

The widow's right of maintenance by the heir of her deceased husband has not been established in the Superior Courts, although there are certain dicta which indicate that she has such a right. There is a difference of opinion among writers, and those who maintain that she has such a right in law do not cite legal authorities to

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1. The rule that a widow's right to remain in her deceased husband's house is subject to her "good behaviour" operates in some Ghanian communities and has been recently criticised by Wiredu, J., in Amissah-Abaidoo v. Abadoo [1974] 1 G.L.R. 110 at 131, see below, pp.446-447.

2. Okoro, The Customary Laws of Succession in Eastern Nigeria, op.cit.,p.131.

support their statements. The better opinion, and one which accords with the evidence collected during field-work, is that the widow has no legal right of maintenance by her deceased husband's heir which can be enforced in a court of law. If the widow has maintained good relations with the family, depending on the reputation of the family, she is certain to be looked after by members of the family after her husband's death, even from their own resources. Neglect of a widow who has contributed to the general welfare of the family would be considered a blot on the good name of the family, and might deter other women from marrying into the family. Women in Nigeria still marry into a family because of its reputation and status. For example, a young wife in Onitsha who came to report to a member of her husband's family that she had been given no maintenance by her profligate husband, was asked why she had married him, since she knew his propensity for drink and riotous living. She retorted that she had not married him as such, but rather his family, the wealthy members of which she expected to cater for her needs. She ended by saying that she would never have dreamed of marrying her husband if it were not for the reputation and wealth of his family. This case illustrates the need for a family to act in such a way that the future marriage prospects of its members are enhanced, and taking care of a widow would certainly be to its credit.

On the other hand, the widow who has a bad reputation among her husband's family would be given little consideration, and in many cases, would be virtually cut off without the proverbial penny, since there is no legal duty to give her any portion of her husband's property or to maintain her.

In actual fact, there are many widows today who are deprived of maintenance by their husbands' heirs, even in cases where such heirs have inherited a substantial amount of property from the deceased.[1] This is one result

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1. See Dan Ibekwe, "Conflict of Cultures", op.cit.,p.306.

of the growing individualism, and the increasing disregard of traditional practices, which made certain systems laudable.

Social Welfare Officers report numerous cases of neglected widows, especially among the Igbos. Unfortunately, precise statistics cannot be easily given due to the fact that these cases are not tabulated separately in Social Welfare reports, but are invariably included with cases of neglected wives. In Mbano Division, where widow neglect and maltreatment are recorded separately, out of 249 matrimonial cases recorded for 1974/1975, 25 involved complaints by widows whose deceased husbands' relatives had taken all their property, but failed to maintain them.[1] In Mbaise Division in 1975, out of 200 matrimonial cases there were 27 complaints by deprived widows.[2]

While interviewing a fairly old widow in Onitsha the interpreter was asked to enquire from her whether she was being maintained by her deceased husband's family. The interpreter thought that there was no need to ask this question, since she, as a member of the husband's family, was sure that the widow was being looked after by the family. On the insistence of the present writer that the widow should be allowed to speak for herself, the widow loudly and vehemently claimed that she was not being maintained by anyone, and that if she and the other widow and their infant children, had depended on the deceased's relatives they would have certainly starved; no member had given them a penny since the husband's death, nearly ten years ago.[3]

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1. See Annual Report, Mbano Division, 1974/75, included in the Report for Owerri Zone, ref. OWZ/SW/27/S1/75.
2. See Annual Report, Mbaise Division, 1975.
3. See Anyakwo (suing by his next friend v. Anyako [1974] Suit No. O/71/1974, unreported decision of Onitsha High Court decided on 28th Oct. 1974, where an infant applied for appointment of a Receiver of his deceased father's property on the ground that his uncle gave his mother and himself none of the rents to be collected from the deceased's estate, many years after his father's death.

In another case which involved a prominent Onitsha family, the widow was ejected from her deceased husband's home as soon as he died. Her two female children were retained by the family. The deceased had been previously married and had grown-up children who had bitterly opposed his marriage to the widow, many years his junior, and younger than some of his children. In addition, she was not a native of Onitsha, and the husband in his life-time had been very indulgent towards her, and this apparently had added to the family's disapproval of the union. It was alleged that as a result of the family's treatment, the widow was exhibiting signs of insanity, and was a burden on her natal family who were contemplating court action against the deceased husband's family if no private settlement could be reached, since allegedly, the widow had no hope of remarriage.

Apologists of the system whereby widows are excluded from inheritance rights in their deceased husband's estate, argue that, although the widow does not inherit directly, she inherits by virtue of her sons, and in some communities by virtue of daughters also. This argument ignores the pertinent fact that the widow may have no children, or no children who survive her deceased husband. In the context of Nigerian contemporary society, where there is increasing individualism, and the collapse of the extended family system; where sons living in Nigeria have not visited their mothers for ten or more years, it is unwise for a widow to be forced to depend on her children, or her husband's children.

The widow's right to inheritance, if dependent on her children, may be intentionally defeated. For example, the heirs may decide to sell the family property and share the proceeds, or they may effect a partition of the property, in which case each person's share becomes individual property liable to disposal by will or otherwise. The widow cannot legally prevent the heirs from taking either course. The widow's right to inheritance through her sons may also be defeated inadvertently by operation

of law. Take, for instance a hypothetical case where H, married according to Onitsha customary law, dies intestate leaving a widow, a son, two daughters, and a considerable amount of immovable property. Under customary law, the son inherits everything. The son marries under the Nigerian Marriage Act in Ibadan, where most of his father's property is also situated. The son dies intestate, leaving his widow and one child. As will be seen shortly, his widow and child are entitled to inherit all his individual property, including that inherited from his father,(since he is the only heir, the property is inherited as individual property), to the exclusion of his mother and sisters. The case is even clearer where the son sells his father's property and buys other property with the proceeds. His mother and sisters have no share in such properties if he marries under the Nigerian Marriage Act and dies intestate leaving a widow and children.

The plight of the Nigerian widow who has been deprived of inheritance rights in her deceased husband's property, has not received due attention from the Superior Courts in Nigeria.

In the recent Ghanian case of Amissah-Abadoo v. Abadoo[1] the property rights of a widow received extensive treatment, and Wiredu, J., after a review of several authorities, held that customary law recognized not only the rights of the children but also those of the widow to live in her deceased husband's self-acquired house during widowhood. Where the deceased lived in a family house with his wife and children, the widow and the children had no interest save a right of occupation "subject to good behaviour". With reference to the limitation of the rights, the learned Judge observed:

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1. [1974] 1 G.L.R.110; see also Halmond v.Daniel [1971] Sar. F.C.L. 182 at pp.182-183 and contrast Swapim v. Ackuwa [1888] Sar. F.C.L. 191 and Kwakye v. Tuba [1961] G.L.R. 535.

> "The injustices and hardships created for children and widows by tacking the phrase "subject to good behaviour" as a limitation to their rights to reside in houses which their deceased fathers and husbands respectively die possessed of, irrespective of how they came by such property, have been ignored indiscriminately in the past to the detriment of the children and widows. The conduct of the family flowing from this neglect must be frowned upon as behaviour not countenanced by customary law and called for an urgent need for a more realistic and practical reappraisal of this aspect of the customary law in view of the fast social changes in the country caused partly by the high rate of inter tribal marriages and partly by the development of money economy which has provided other modes of acquiring wealth".[1]

The situation of a Nigerian widow of a customary marriage calls for urgent legislation aimed at ensuring that she receives adequate provision in the distribution of her deceased husband's intestate estate.

B. Islamic law marriage

In contrast to the customary law wife who does not inherit directly from her deceased husband, the wife of an Islamic law marriage is a Koranic heir, and she is entitled to a share in her deceased husband's property, whether he dies intestate or not.[2] The size of her share depends on whether the deceased left any children or agnate grandchildren.

The Koran provides:

> "And your wives shall have a fourth part of what ye leave, if ye have no issue; but if ye have issue, then they shall have an eighth part of what ye leave after paying the bequests he shall have bequeathed and debts".[3]

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1. Amissah-Abadoo v. Abadoo [1974] 1 G.L.R. 110.
2. See generally, Ruxton, Maliki Law, op.cit., pp.373-397, Coulson, Succession in the Muslim Family, op.cit., p.41; Fyzee, Outlines of Muhammadan Law, op.cit., p.403 et.al., esp. p.405.
3. Rodwell, The Koran, op.cit., p.sura IV, verse 14; see also Coulson, Succession in the Muslim Family, op.cit., p.41; Fyzee, op.cit., p.405.

The customary law of succession in pre-Islamic Arabia, not unlike customary law in Nigeria, was designed to keep property within the family. Women, wives as well as daughters, were consequently excluded from all inheritance rights in their deceased husbands' or fathers' estates. The basis of the Koranic provision was as follows:

> "The wife of Sa'd b. al-Rabi came to the Prophet with her two daughters and said:
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> "O Prophet these are the daughters of Sa'd b.al-Rabi. Their father died a martyr's death beside you in battle. But their uncle has taken Sa'd's estate and they cannot marry unless they have property". After this the verse of inheritance was revealed and the Prophet sent for the uncle and said to him: "Give the two daughters of Sa'd two-thirds of the estate, give their mother one-eighth and keep the remainder yourself".[1]

The widow Sa'd's case embodies the essence of the changes introduced under Islam into the customary law of ancient Arabia with reference to inheritance by women. Under Islamic law, the widow inherits one-quarter of her husband's estate which is available for distribution among the heirs, if the deceased has no children or agnatic descendants. If there are children or other descendants, the widow's portion is one-eighth. The wife's portion is a collective one in the case of polygynous unions. Two or more surviving wives share equally in the one-quarter or one-eighth of the estate, as the case may be. This may be compared with the share of the husband in his deceased wife's estate. He receives one-half of it if there are no children, and a quarter if there are, and since polyandry is forbidden in Islamic law, he shares these portions alone.[2] There is therefore no equality of inheritance rights between husband and wife in Islamic law marriage, but at least the wife is

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1. This version of the Prophet's decision appears in al-Mughnī of Ibn Qudāma, VI, 166, see Coulson, Succession in the Muslim Family, op.cit., p.29

2. See Coulson, Succession in the Muslim Family, op.cit., p.41.

sure that some portion of her deceased husband's estate will be given to her.

Unfortunately, the evidence of practice among the Northern Nigerian Moslems communities reveals that in most cases, while a deceased husband's movable property may be shared according to Islamic law,[1] in the case of land and houses, customary law prevails. Palmer,[2] reporting on inheritance rights among the Hausas, early in the century, noted:

> "The Native Courts observe the customary law with regard to land as far as it is a subject of inheritance, that is to say, as far as prior rights to user can be inherited. In theory, as regards the order of succession and questions between would-be inheritors inter-se the Moslem law is administered if the parties are Moslems; native customary rules of succession, if they are not. In practice, however, great diversity prevails between different courts, and courts at different times give conflicting decisions...The fact that frequently, on a change of Alkali or Seriki, large migrations occur, is often due to his being known as enforcing Moslem law without regarding the customs of Maguzawa [pagan Hausa] or Kityu (pagan Fulani). The best native authorities supported, I believe, by considerable authority in Moslem legal textbooks, hold that 'custom' in matters of inheritance marriage, etc., should be regarded. But at present the whole subject is ruled by individual caprice".

The fact that inheritance to land in actual practice is governed mainly by customary law, rather than Islamic law, is attested by later investigators.[3] There is

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1. See Alhaji Hassan and Mallam Shuaibu: A Chronicle of Abuja, translated and arranged from Hausa by Frank Heath (Lagos: African Universities Press, 1962), p.64.

2. See H.R. Palmer, Inheritance among the Hausa, in Memoranda on Land Tenure and Land Revenue Assessment in Northern Nigeria by Sir Percy Girouard, African (West) C.0.879, No. 906, Appendix IV.

3. Ibid., Meek, The Northern Tribes of Nigeria, op.cit., p.282, "in Muslim communities inheritance of real property and fixtures is bound up with the customary system of land tenure, and is, in consequence, governed by customary law, while that of personal property is subject to the provisions of the Muslim Sharia"; M.G.Smith, "Hausa Inheritance and Succession", in Studies in the Laws of Succession in Nigeria, edit. by Duncan M. Derrett, (London: Oxford University Press, 1965), pp.245-246; C.W. Michie, Notes on Land Tenure in the Northern Districts of Zaria Emirate in C.W. Cole,

footnote 3 continued.....

some evidence that women, including wives are given inheritance rights in land in a few areas.[1] The principle of customary law in the North, as in other parts of Nigeria, was that land should be kept in the family. Succession was therefore confined exclusively to males, and a widow did not inherit lands or houses from her husband. Application of customary, rather than Islamic law, thus robs the Moslem widow of her divinely allotted rights of inheritance.

Yahaya Muhammad notes that women are now given inheritance rights in Northern Nigeria in areas where houses are sold, and that the Sharia Court of Appeal has reversed many decisions concerning land suits, some of them appeals of women who had been deprived of their rights of inheritance of land or houses.[2]

It was not possible to ascertain with any degree of certainty the extent to which Kanuri Moslem women in Maiduguri inherited houses or lands from their deceased husbands. Women interviewed were all well versed in their Koranic rights,[3] but concrete evidence of practice was difficult to obtain. One interviewee asserted that property of all kinds is shared among children and wives according to Moslem law, although there is nothing to prevent a family from agreeing that there should be no sharing, and that everything would be owned in common, with the eldest brother assuming the position previously held by the father.[4]

Footnote 3 continued .... Report on Land Tenure in Zaria Province (Kaduna: Nigeria, Government Printer), p.68; See also Meek, Land Tenure and Land Administration in Nigeria and the Cameroons, op.cit.,p.163.

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1. See Smith, op.cit.,pp.269-272; Muhammad Yahaya, op.cit., p.19.
2. Muhammad Yahaya, op.cit., p.19.
3. Cf. Southern Moslems of whom it is said "Probably many of those who profess Islam are not even aware of the rules of inheritance their code prescribes - see Rowling, Land Tenure in Ijebu Province, op.cit., p.47.
4. Cole reports that the influence of Islamic law on native customary inheritance of rights in land is particularly pronounced in Bornu, and in the vicinity of the cities of Kano and Sokoto - see Cole, Report on Land Tenure, Zaria Province, para. 15.

Generally, it seems that most widows do not assert their rights to a share of their husbands' land or houses, since Kanuri women continue to remarry at all stages of their lives. Old women are often married by younger men who cannot afford the prohibitive costs of marrying a very young, previously unmarried, girl.

If the widows assert their rights and are prepared to take court action to enforce them, the courts in Bornu State will apply strict Islamic law.

The general position is that the inheritance rights of a widow married according to Islamic law are much better than those of a widow of a customary law marriage so far as movables are concerned. In relation to land, however, their rights are the same. They do not inherit lands and houses left by their deceased husbands, at least in practice, although they are legally entitled to a specified portion.

C. "Statutory" marriage

(1) Introduction

The wife of a statutory marriage is more fortunate in terms of succession rights to her deceased husband's property than her counterparts married according to customary or Islamic laws. The precise rules governing intestate succession in a statutory marriage vary to some extent in different parts of the Federation, but generally, all the wives of a statutory marriage are given some share in the estate of their deceased husbands, including his lands and houses, which he could legally have disposed of inter vivos, or by will.

It has been previously seen,[1] that under customary law the wife does not usually inherit any of her husband's property, and in some societies, notably matrilineal societies, the deceased's children are also excluded

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1. See above, p. 430.

from inheritance rights.[1] The lack of succession rights of a widow, and in many cases of children, to their deceased husband's and father's property respectively, under customary law, was a primary consideration of the framers of the Marriage Ordinance, 1884. The missionaries were particularly disturbed by the fact that in some societies the right of succession was allegedly given to "the sister and nephew,to the exclusion of the wife and legitimate children", of the deceased. Such a practice was described by the Rev. A.W. Parker, Superintendent of the Wesleyan Societies in the Gold Coast as an "eye-sore to the Missionary, who in it beholds his endeavours to raise the moral and social position of the sons and daughters of the country nullified", by judges who enforce such laws. He was of the opinion that the deceased's wife and children should be given preferential treatment.[2]

Before 1884, the devolution of property among Christians and non-Christians was governed by the customary law of the deceased. In 1882, Sir Samuel Rowe, Governor of the Gold Coast Colony, prepared a Bill in which he tried to introduce statutory laws of succession in the terms of a Marriage Ordinance. Section 2 of the Bill provided as follows:

> "The offspring of parents duly married in accordance with such Christian ritual shall be declared to be legitimate and entitled to all such rights in respect of succession to property, as if their parents had

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1. See C.O. 879-20, Dispatch No. 120, Enclosure 2, which sets out the essentials of a customary marriage, and the effect the Marriage Ordinance 1884 would have on the devolution of property in various societies in the Gold Coast (now Ghana); e.g. at Dixcove, it was stated that the eldest nephew always succeeds to all property, including the wives and children of the deceased. This was also the law at Secondee. Fadipe notes that according to traditional Yoruba law the principal beneficiaries of a deceased person are his mother's children, male and female, his own children have no right to his property.

2. C.O. 879-20, Dispatch 441, Enclosure No. 10, dated 24 May, 1879, Rev. A.W. Parker to District Commissioner, Elmina, p.216; see further Appendix II, Chapter X, pp.125-127.

been married according to native law, any native law or custom to the contrary notwithstanding".[1]

Persons who were married by Christian ministers, but who had not gone through any of the customary forms of marriage, were regarded as not being married by the native population, who excluded them from inheritance and other rights. It was to remedy this state of affairs that the Bill was introduced into the Legislative Council. It was intended to confer inheritance rights on the spouses and children of a Christian marriage, but the inheritance rights were to be in accordance with customary law.[2] This Bill was withdrawn after its first reading in the Legislative Council.[3]

Chief Justice Bailey proposed that the Statutes of Distribution as obtaining in England should be made to apply to the deceased husband's personalty, while the realty should devolve on the eldest son, with provisions for annual payments, and portions to the wife and children, charged on the estate by way of dower. Such a provision, it was thought, would "form the greatest if not the only inducement to non-Christian natives to contract marriages legal under the Ordinance".[4] It was the opinion of Acting Chief Justice Jackson that giving the wife and children rights in succession on an intestacy "would do much to improve the law position women at present occupy, and further the cause of education".

The Earl of Derby, in his amendment of Mr. Woodcock's draft Ordinance, proposed that a succession clause should be inserted in the Marriage Ordinance, 1884.[5] His

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1. Ibid., Dispatch No. 200, Enclosure No. 9. From Administrator Moloney to the Colonial Office, transmitting copies of the "Marriage Ordinance" which had passed the first reading.
2. See Ibid.,Sir S. Rowe to Colonial Office, dated 31 July, 1882 explaining his reasons introducing the Bill to Council.
3. For the history of this Bill see further, above, Chapter X, p.122 and Appendix II, pp.125-127.
4. See C.O. 879-20, Enclosure 5 in No.18; Acting Chief Justice Bailey to Administrator Moloney, C.M.G. dated 29 Aug., 1882, p.222.
5. Ibid.,Dispatch No. 122, 22 March, 1883, p.224.

proposal was not universally acceptable. There were many who objected to any change in the customary laws of succession. For example, Administrator, F. Evans, objected to "any interference with the ancient and old established customs of the Natives", on the ground that it was desirable to avoid creating by law a state of things which "would be productive of constant trouble and irritation".[1] Others objected to the amalgam of a law relating to the descent of property with one regulating the formalities requisite to constitute a marriage. According to one critic,[2] such a procedure was not "artistic", especially in a country where the descent of property is regulated without any regard to marriage at all.[3]

In spite of these objections, Lord Derby's proposal was effected. Section 36 of the present Nigerian Marriage Act is the result. It provides:

> "(1) Where any person who is subject to native law or custom contracts a marriage in accordance with the provisions of this Ordinance, and such person dies intestate, subsequently to the commencement of this Ordinance, leaving a widow or husband, or any issue of such marriage; and also where any person who is the issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this Ordinance; the personal property of such intestate and also any real property of which the said intestate might have disposed by will, shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding: Provided that -
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> (a) where by the law of England any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the Crown, such portion shall be distributed in accordance with the provisions of native law and custom, and shall not become a portion of the said casual hereditary revenues; and
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> (b) real property, the succession to which cannot by native law or custom be effected by testamentary disposition, shall descend in accordance with the

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1. Ibid., Dispatch No. 120, 21 April, 1885., p.83.
2. Ibid., Enclosure 3 in No. 29, p.244.
3. For other criticisms of the rights of succession in the Marriage Ordinance, 1884, see C.O. 879-20, pp.205, 208, and 213.

provisions of such native law or custom, anything herein to the contrary notwithstanding.

(2) Before the registrar of marriage issues his certificate in the case of an intended marriage, either party to which is a person subject to native law or custom, he shall explain to both parties the effect of these provisions as to the succession to property as affected by marriage.

(3) This section applies to the Colony[1] only.

The succession clause in the Marriage Act was born in conflict, and throughout its existence conflict has attended its interpretation. Many of the problems which arise, as will be seen later, are due to the fact that section 36 of the Marriage Act applies only to the Colony, and this leaves a vacuum with reference to the other parts of Nigeria, except in those places which previously were parts of the former Western Region. Even with regard to the Colony, the Act is not precise, and the circumstances under which Section 36 becomes applicable in the Colony is far from clear.

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1. For definition of the Colony see The Colony of Nigeria Boundaries Order in Council, 1913, Laws of the Federation of Nigeria, 1958, p.219 - Colony of Southern Nigeria. The definition of the territory which may now be considered as the "Colony" is far from clear. Before 1967, the consensus of academic opinion is that the "Colony" meant the Federal Territory of Lagos, - see Nwabueze, Nigerian Land Law, op.cit.,p.405; Park, Sources of Nigerian Law, op.cit.,p.58; Obi, Ibo Law of Property,op.cit.,p.211; Odje, op.cit.,p.58. The former "Colony" became a part of Lagos State in 1967, see schedule to the States (Creation and Transitional Provisions) (Amendment) Decree, 1967, No. 19 of 1967; see Nwogugu, Family Law in Nigeria, op.cit.,p.289. By the Lagos State (Applicable Laws) Edict. 1968, No. 2 of 1968, Schedule 2, The Administration of Estates Law, 1959, was no longer applicable to those parts of Lagos State where it had applied previously, and Section 36 of the Marriage Act presumably applied to the whole of Lagos State. The Lagos State (Applicable Laws) Amendment Edict, No. 11 of 1972, S.4(2) has altered the position in Lagos State, by applying the Administration of Estates Law, 1959, to the whole of Lagos State from 1 May, 1972. Although the Edict did not specifically repeal or refer to section 36 of the Marriage Act, the latter is to be regarded as repealed by implication, since succession is exclusively within the jurisdiction of the States legislatures, see Administration of Estates Law, 1959, Cap.2, Laws of Lagos State, 1978.

The position with regard to statutory rules of succession in the different parts of the Federation will now be examined.

(11) The Colony (previously the Federal Territory of Lagos)

For section 36 of the Marriage Act to apply, a marriage under the Act must be celebrated in Lagos. This is evident from the fact that if either party to the marriage is subject to customary law, the Registrar, prior to the issue of his certificate, is required to explain to both parties, the effect the marriage will have on their succession rights. This provision,which was specially inserted to ensure that the intended spouses had full knowledge of the legal effect of celebrating a marriage under the Act, does not apply to marriages outside of Lagos.

Are all marriages celebrated under the Act in Lagos within the section, regardless of where the immovable property affected is situated, or where the deceased was domiciled at the time of death? It is submitted that the rules of private international law will be followed in such cases. In Zaidan v. Mohssen,[1] the Supreme Court held that Nigerian law as the lex situs, applied to the devolution of the immovable property of an intestate domiciled in Lebanon, situate at Warri, and that Nigerian law for this purpose meant the laws of the Mid-Western State of Nigeria of which Warri formed a part.

Movables are governed by the law of the domicile of the deceased at the time of death.[2] It seems safe to say, therefore, that section 36 will apply if the marriage under the Act is celebrated in Lagos, and in the case of immovables,

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1. [1973] N.M.L.R. 427; [1973] All N.L.R.86; see also the Ghanian case of Youhana v. Abboud [1974] 2 G.L.R. 201; cf. Gamson v. Wobil and Kra v. Wobil [1947] 12 W.A.C.A. 181, where it was held that internal conflict of law did not arise, since the personal law of the deceased upon which succession to her estate should be determined is fixed, being attached to her at birth, therefore the pure Fanti law of succession which prevailed at her place of birth applied, and not the customary law of the place where the property she left was situated.
2. In the Matter of the Estate of Edward Anfu Whyte [1946] 18 N.L.R.70.

the property was situated in Lagos, or in the case of movables, the deceased was domiciled in Lagos at the time of his death. This involves a consideration of the law of domicile, which is itself not free from doubt.

Prior to 1970, there were conflicting decisions as to whether there was a single Nigerian domicile or a separate domicile for each Region (later State).[1] The Matrimonial Causes Decree of 1970 provides that a person domiciled in any State of the Federation is domiciled in Nigeria for the purposes of the Decree. Whether a single Nigerian domicile will similarly be adopted in the application of section 36 has not been judicially decided. It is possible for State and Federal domiciles to exist concurrently for different purposes in a Federation.

The salient points in connection with section 36 of the Marriage Act, relevant to the discussion, briefly stated are:

(1) the section applies only to Lagos in the circumstances stated above;

(11) by virtue of the section, the customary law of succession was changed so as to give a widow married under the Act a share in her deceased husband's intestate estate, movable and immovable;[2]

(111) the widow (or widows) of the issue of a statutory marriage to which section 36 applies, whose husband dies intestate, is given a similar right irrespective of whether such issue is himself married under the Marriage Act, or under customary or Islamic law.[3] This provision has been criticized as an unwarranted extension of the English laws of inheritance.[4]

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1. See further Nwogugu, Family Law in Nigeria, op.cit., pp.95-100; and above, Chapter XI.

2. See Oke v. Adesanya and Anor.[1974] 6 C.C.H.C.J.681; Taylor v.Taylor [1960] L.L.R.286, children acknowledged by the deceased before the statutory marriage entitled to share under s.36 of the Marriage Act.

3. See In Re Somefun and Williams [1941] 7 W.A.C.A.156.

4. See Odje,"Law of Succession in Southern Nigeria," op.cit., p.98.

Its operation may result in an advantage to one spouse. For example, W, the child of a statutory marriage within the ambit of section 36, marries H, whose parents were married according to customary law. W and H are married according to Yoruba customary law, and ordinarily, are not entitled to share in the intestate estate of a deceased spouse.[1] If W, predeceases H, however, as a result of section 36, H would be entitled to a share of W's intestate estate. But if H predeceased W, she would not be entitled to a share in his intestate estate, her rights being governed entirely by customary law;

(IV) it would appear from decided cases[2] that where a deceased intestate was married under the Marriage Act, but dies leaving a widow (or possibly widows) of a subsequent customary marriage she (or they) would be entitled to claim in the distribution of his estate under section 36. It is certain that the architects of the Marriage Ordinance 1884,[3] never intended to benefit the widow of a customary marriage in this way, since they hoped that the rights of succession given to a wife and children of a statutory marriage would encourage people to contract such marriages. Odje describes the decision of Coleman v. Shang,[4] where it was held that the widow of a customary marriage was entitled to claim in the distribution of the intestate estate of her deceased husband under the Marriage Act of Ghana, as "one of the valiant attempts at judicial manipulation".[5]

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1. In Yoruba customary law the intestate estate of a married woman is inherited by her children, see Johnson v. Macaulay and Anor.[1961] 1 All N.L.R. 743.
2. See e.g. Coleman v. Shang [1959] G.L.R. 390.
3. No. 14 of 1884.
4. [1959] G.L.R. 390.
5. See Odje, op.cit.,p.98.

(V) the Marriage Act provides that the intestate estate of the deceased should be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates.[1] The law of England on intestacy has undergone several changes. There is a conflict of opinion as to the effective date of reference to English law. For example, in Re Estate of Odulaja,[2] the reference date was stated as being 1884, whereas in Johnson v. United Africa Company,[3] the view was expressed that the date should be 1914, when the present Marriage Act was enacted. The year 1900 is also mentioned as being the latest date for the general reception of English law into Nigeria.[4] The point is important since, if either 1900 or 1914, is the operative date, widows can claim the benefit of the Intestates Estates Act, 1890, whereas it would be excluded if 1884 is chosen. In all cases the Statute of Distribution 1670 - 1685 would apply. The Intestates' Estates Act 1890,[5] is especially beneficial to widows. The better opinion seems to be that 1914 is the relevant date.[6]

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1. See Osho and Ors. v. Phillips & Ors.[1973] 3 U.I.L.R. 316; Idowu and Ors.v. Bakare [1974] 6 C.C.H.C.J. 675.
2. [1938] 13 N.L.R. 13.
3. In Taylor v. Taylor [1934] Suit No. 127 of 1934, the West African Court of Appeal held that the Administration of Estates Act does not apply in Nigeria - see Elias, Land Law, op.cit.,p.216.
4. See above, Chapter II, p. 195.
5. 13 Stats., 32.
6. See Johnson v. United Africa Company [1936] 13 N.L.R.13; see opposing views of Nwabueze, op.cit.,pp.413-417; Okoro, op.cit.,pp.172-173; Re Estate of Odulaja [1964: L.L.R.108; Kasunmu and Salacuse, op.cit.,pp.266-267; Coker, op.cit.,p.279; A.B. Kasunmu, "Intestate Succession in Nigeria", Nigerian Law Journal, 1964-1965, Vol. pp.50-58.

(VI) under the Statutes of Distribution 1670-1685, the widow takes one-third of her deceased husband's estate (personalty only), if he is survived by issue. In default of issue, the wife is entitled to one-half absolutely. Under the Intestates' Estates Act, 1890,[1] if the deceased husband had no issue who survive him, the widow is entitled to the entire estate, real and personal, if the total value does not exceed £500. If the estate exceeds this amount in value, she is entitled in addition to a charge upon the estate for £500 with interest from the date of the death of the intestate, until the amount is paid.

(VII) in all cases under section 36, English law applies to the distribution of movables and immovables.

(VIII) property which the deceased intestate could not dispose of by will is not affected by section 36. Consequently, unpartitioned family property in which the deceased had an interest is excluded.[2]

(111) Oyo, Ogun, Ondo, Bendel and Lagos States

Intestate succession in the States which were previously parts of the former Western Region of Nigeria, is governed by the Administration of Estates Law, 1959,[3] which is modelled on the English Administration of Estates Act, 1924.[4] In 1972, Lagos State (Applicable Laws) Amendment Edict made the Western Region's Administration of Estates Law, 1959 applicable within Lagos State. Section 49(5) of the Administration of Estates Law, 1959 is similar to section 36 of the Marriage Act. It provides:

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1. (53 and 54 Vict.C.29).
2. See Daniel v. Daniel [1956] 1 F.S.C.50.
3. Cap 1, Laws of the Western Region of Nigeria, 1959; see also Cap 2, Laws of Bendel State, 1976.
4. 13 Stats.38.

"Where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Ordinance and such person dies intestate after the commencement of this Law leaving a widow or husband or any issue of such marriage, any property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of this Law, any customary law notwithstanding".

The significant features of this Law are:

(1) it does not apply in cases where the death occurred before the commencement of the Law;[1]

(11) unlike section 36 of the Marriage Act, the Administration of Estates Law, 1959 applies only to persons who were themselves married under the Marriage Act;

(111) the Law does not apply to the intestate estate of a person subject to customary law, who marries according to such law. Customary law in this context includes Islamic law. The Law was held not applicable to the intestate estate of a Moslem man domiciled in Lebanon, who died leaving immovable property situated in Bendel State;[2]

(IV) both movable and immovable property devolve in the same manner;

(V) the rights of a surviving spouse, whether husband or wife, are the same in similar circumstances;

(VI) the law centres on the nuclear family, and if any member of that family survives, the deceased's other relations are excluded. The surviving spouse and issue or issues are entitled to the entire estate. If the deceased left no issue, but a surviving spouse, the surviving spouse alone excludes all claimants to the deceased's estate more remote than the deceased's parents, or brothers or sisters of the full blood and their issue.[3]

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1. Section 1(2).

2. Zaidan v. Mohssen [1973] 11 S.C.1; [1973] All N.L.R.86; see also, Youhana v. Abboud [1974] 2 G.L.R. 201.

3. See further, Nwabueze, op.cit., pp.415-417.

(IV) Eastern and Northern States

Unlike the Western, Bendel, and Lagos States, there are no statutory provisions governing the effect of a statutory marriage on the customary and Islamic laws of inheritance in the Eastern and Northern States. The Marriage Proclamation, 1907,[1] which, prior to 1914 applied in the Northern Protectorate of Nigeria, although similar to the Marriage Ordinance 1884, was entirely different in relation to the section on inheritance rights. Section 37 of the Proclamation provided:

> "Where any person who is subject to native law and custom contracts a marriage in accordance with the provisions of this or any other law relating to marriage or has contracted a marriage prior to the passing of this Proclamation which marriage is hereby validated, and such person dies intestate, any real and personal property belonging to such person shall be distributed in accordance with Native Law and Custom and not in accordance with the law of England".

Before 1914, therefore, the application of succession law in the Northern States was unaffected by a statutory marriage. The Marriage Proclamation 1907, was repealed by the Marriage Act, 1914 and the operation of section 36, was restricted to the Colony. It is obvious that the intention of the legislators of 1914 was that the succession laws were not to be affected by a statutory marriage except in the Colony.

It has been seen, however, that even in the Colony, section 36 does not cover all possible cases of succession. For example, it does not cover the case where an intestate deceased, domiciled in the Colony, contracted a statutory marriage outside Nigeria and left property within the Colony. Such a situation occurred in the well-known case of Cole v. Cole,[2] where the intestate estate of a native of Lagos, domiciled in Lagos, who had contracted a marriage according to Christian rites in Sierra Leone, was claimed by his widow

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1. No. 1 of 1907, Laws of the Protectorate of Northern Nigeria.
2. [1898] 1. N.L.R. 15.

on behalf of her lunatic son, and by his brother as customary heir. The crux of the matter was whether English law or customary law should be applied. The customary law claim of the brother was accepted by the trial court. On appeal, however, the decision was reversed. Griffith, J., compared customary marriage and Christian marriage. He held that a Christian marriage imposes on the husband duties and obligations not recognised by native law, and that in fact, Christian marriage clothes the parties and their offspring with a status unknown to native law. The application of customary law to the intestate estate of a deceased spouse of a statutory marriage would, the learned Judge held be "contrary to the principles of justice equity and good conscience". He reasoned thus:

> "Were such a contention to hold good then an educated native Lagos gentleman - may be a doctor, or a barrister, or a clergyman, or a bishop (for there are all such) - marrying an educated lady out of the Colony and coming to reside permanently in Lagos would have his estate subject to native law in case he died intestate, his widow being required by a strict undiluted, native law to act as wife to her brother-in-law in order to obtain support. ...I am of opinion that this is a case in which the Court ought not to observe the native law of inheritance".[1]

The common law of England, under which the eldest son, whether he is a lunatic or not, is the heir, was applied. As a result, the son was declared the heir of the deceased, and the widow was held entitled to dower and to one-third of her husband's personalty.

Although the learned Judge, with respect, erred in some of his observations as to Yoruba customary marriage,[2]

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1. Ibid., pp.22-23.

2. For example, the learned Judge observed: "It is a consequence of the loose tie of the native marriage that by strict native law a man's eldest brother on his mother's side inherits. The brother is part of the man's family. The wife and her children are part of the wife's family". The Yorubas are patrilineal peoples, and although children have certain rights in their mothers' family, they belong to, and inherit mainly from their fathers' family; see Idewu v. Hausa and Ors.[1936] 13 N.L.R.96; Taiwo v. Lawani [1961] 1 All N.L.R. 703.

footnote 2 continued.....

the logic of his decision is incontestable in law and in fact, and illustrates the gravamen of the contention relating to the so-called "wife inheritance". The decision has been criticised, both judicially,[1] and by academic writers,[2] but it has not been overruled so far as it deals with the choice of law in succession cases.

The decision was utilized in a case in one of the Eastern States, where there are no statutory rules governing the effect of a statutory marriage on the customary and Islamic laws of succession. In Re Emodie, Administrator-General v.Egbuna and Ors.[3] an Igbo, lived and died intestate in the Protectorate. He left property, movable and immovable in the Protectorate. He also left a widow whom he had married in the Protectorate, under the Nigerian Marriage Act, but no children of the marriage. He was survived by a brother, a sister and an illegitimate daughter. The deceased's estate was being administered by the Administrator General, who brought an action to decide whether the personal estate should be distributed in accordance with English law or with customary law. It was argued by the respondents that, as section 36 of the Marriage Act only applied to the Colony, the personal estate should be distributed in accordance with customary law.

Footnote 2 continued..... Nwabueze notes that this system of cognatic descent is not of universal application throughout Yorubaland, and is limited to certain communities only, e.g. Ijebu and Ondo, see Nwabueze, op.cit., p.383. Talbot, Peoples of Southern Nigeria, op.cit.,Vol.III, p.678; cf. Lopez and Ors.v. Lopez and Ors. [1924] 5 N.L.R. 47 at p.50.

1. See Smith v. Smith [1924] 5 N.L.R.102 and 104; obiter Dicta in Onwudinjoh v. Onwudinjoh [1957] 2 E.R.L.R.1.

2. See Okoro, op.cit.,pp.186-190; A.B. Kasunmu, "Intestate Succession in Nigeria", 1, Nigerian Law Journal,1964-65 pp.50-58 at p.56; Nwogugu, op.cit.,p.298; J.W. Salacuse, Birth, Death and the Marriage Act: Some Problems in Conflict of Laws", 1 Nigeria Law Journal,1964-65, pp.59-72, pp.65-67.

3. [1945] 18 N.L.R.1.

The Supreme Court rejected this contention. In a judgment given by Ames, J., it was stated as follows:

> "Because section 36 of the Marriage Ordinance applies only to the Colony, it does not follow that the opposite, so to speak is the law in the Protectorate. It only means that one must look elsewhere than this section for guidance on this point...
>
> I do not think it necessary to look very far. It seems to me that the principle enunciated in the well-known case of Cole v. Cole (1) covers the point".

The learned Judge gave an additional reason, which is pertinent to the discussion, in support of the principle enunciated in Cole v. Cole. He said:

> "Native law and custom sometimes recognises relationships which English law would not recognise but would regard as illegitimate if the parties have contracted a Christian marriage. Such illegitimate relatives would not be recognised by this Court during the lifetime of the parties to the marriage. Could it be said to be just and equitable and a matter of good conscience that such relatives should be recognised as soon as one of the parties to the marriage dies, whenever the local law and custom is of this kind"?[1]

It was directed that the estate should be distributed according to English law.

The principle enunciated in Cole v. Cole[2] has been applied in many other cases.[3]

3. Testate Succession

> "What is a testament? It is the expression of the will of a man who has no longer any will, respecting property, which is no longer his property: it is the action of a man no longer accountable for his actions to mankind; it is an absurdity, and an absurdity ought not to have the force of law".
>
> Bulwer's Historical Characters.[4]

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1. Ibid., p.2.
2. [1898] 1 N.L.R.15.
3. See e.g. Adegbola v. Folaranmi [1921] 3 N.L.R. 89; Coker and Ors. v. Coker and Ors. [1943] 17 N.L.R.55; Olympio and Ors. v. Oluwole and Anor. [1968] N.M.L.R.469; Gooding and Anor. v. Martins [1942] 8 W.A.C.A.108; Haastrup v. Coker [1927] 8 N.L.R.68.

Footnote 4 continued.....

A. Introduction

A will or testament is the machinery whereby a person in his lifetime can direct how his property is to devolve after his death. A will takes effect only from the date of the death of a testator. By a will a testator may dispose of his individually owned property so as to exclude those persons who would have succeeded to it under the applicable rule of intestacy which governs his particular case.[1]

A will may be made under any of the three systems of law operative in Nigeria, viz., customary law,[2] Islamic law[3] or the general law.[4] In traditional society, a customary law will was usually oral, since customary law knew no writing, and was invariably in the form of a voluntary oral declaration in the presence of responsible and disinterested persons, including members of the family. It is usually made in immediate expectation of death. According to Hausa customary law, an oral, or nuncupative

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Footnote 4 continued....

4. Vol.1, p.114 as quoted by William Markby, Elements of Law considered with Reference to Principles of General Jurisprudence, op.cit., p.386.

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1. See generally Brian Harvey, The Law and Practice of Nigerian Wills, Probate and Succession (London: Sweet and Maxwell, 1968); Nwabueze, Nigeria Land Law, op.cit., pp.418 - 429; see Lloyd, Yoruba Land Law, op.cit., pp.290-292, for an account of actual practice among some Yoruba communities; Coker, Family Property Among the Yorubas, op.cit., p.247.

2. See Ajoke v. Olateju [1962] L.L.R.137; Nelson v. Nelson [1932] 1 W.A.C.A.215; Ayinke v. Ibidunni [1959] 4 F.C.S.280; see also Elias, Nigerian Land Law, op.cit., pp.203-204; Nwabueze, Nigerian Land Law, op.cit.,p.380; Coker, op.cit.,p.248; cf. Lloyd, "Yoruba Inheritance and Succession", in Studies in the Laws of Succession in Nigeria, edit. by J. Duncan M. Derrett (London: Oxford University Press, 1965), pp.139-173 at p.165.

3. See Apatira and Anor.v. Akanke and Ors.[1944] 17 N.L.R.149; Ayoola and Ors.v. Folawiyo and Ors.[1942] 8 W.A.C.A.39; George v. Administrator General [1952] 21 N.L.R.83.

4. Wills Act 1837, s.3; Wills Law, Cap.133, Laws of Western Region of Nigeria, 1959 Revision, s.3.

will made before members of the deceased's family is generally observed whether the testator be male or female,[1] and this position obtains in many other systems of customary law.

Freedom of disposal, even of individually owned property, may, however, be restricted in some customary law systems. For example, among some Igbo communities, there are certain items of property which a man has no power to dispose of by will. There are his interest in any family or commercial property, his compound, including the Obi, his ofo, and those items of property to which his eldest son or eldest daughter is entitled as special shares, on his intestacy.[2] Similarly, it seems, a married woman cannot legally dispose of her lands or houses by will under customary law.[3]

Under Islamic law, a person can dispose of only one-third of his net estate[4] by will, which may be oral or written, but property can only be given to persons other than the heirs whose rights to two-thirds share of the estate is legally protected against testamentary disposition.[5]

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1. See Palmer, "Inheritance Among the Hausa", op.cit., para. 3; see also Coker, Family Property Among the Yorubas, op.cit., pp.247-255; Obi, Ibo Law of Property, op.cit.,pp.206-208.

2. Customary Law Manual, 1977, op.cit.,p.145, par.218; see also Nwabueze, Nigerian Land Law, op.cit.,pp.420-421; Okoro, op.cit.,pp.78-81.

3. Customary Law Manual, op.cit.,pp.201-205; Meek, Law and Authority, op.cit.,pp.323-324; Obi, Ibo Law of Property, op.cit.,pp.193-194;Nwabueze, Nigerian Land Law, op.cit., pp.420-421; cf. Nwogugu, Family Law in Nigeria, op.cit., pp.308-309.

4. The net estate are the assets available for distribution after the payment of the funeral expenses and debts, see Coulson, Succession in the Muslim Family, op.cit., p. 235.

5. This rule is confined to the Sunni schools, and its purpose is allegedly to prevent interference with the precise balance between the claims of the various relatives established by the laws of inheritance. The rule is said to avoid the enmity which might arise among the heirs as a result of the preferential treatment of one of their number by the deceased's will; see Coulson, Succession in the Muslim Family, op.cit., p.239.

Under the statutory provisions, a testator may dispose of his individually owned property without restraint. This principle conflicts with both customary and Islamic laws which, as previously noted, place certain restrictions on testamentary capacity.

B. Testamentary capacity

(1) Customary law

Under most systems of law all adult persons have capacity to make a will, either orally, or in contemporary Nigeria, in a written document. The power of a married woman to make a valid will, however, was severely restricted in some societies, especially in relation to immovable property. This was the natural consequence of her legal incapacity to own or dispose of property during her life-time. For example, the Customary Law Manual, 1977 states:

> "267. Gift of landed property by will -
>
> (1) Married women - A married woman has no right to dispose of her land, house or economic tree by will.
>
> Local variations - A married woman has this right in Edda clan and Afikpo town in Afikpo Division, Idemili and Mbaise Divisions. In these places, however, the woman has to confine her gift to her own children or, if she has no children to members of her husband's family".[1]

A similar restriction is imposed on divorced women, widows living with their husbands' families, or widows who have left their deceased husbands' families but have not repaid the dowry paid with references to their marriages, and even on adult unmarried women.[2]

A man, on the other hand, whether married or not, has full testamentary capacity to dispose of his property subject to the following exception:

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1. Customary Law Manual, op.cit.,pp.203-204, par.267(1).
2. Ibid.,pp.204-205.

"218. Property not disposable by will. - There are items of property which a man has no power to dispose of by will. These are his interest in any family or communal property, his compound including the obi, his ofo and those items of property to which his eldest son or eldest daughter is entitled as special shares on his intestacy".[1]

There is thus a clear discrimination against women, in these customary laws, a discrimination which also obtains in many other communities.[2] As earlier seen, such provisions are contrary to section 39 of the Constitution of Nigeria, 1979, and they also conflict with the provisions of the Will's Act 1837,[3] as amended by the Married Women's Property Act, 1882.[4]

(11) Islamic law

Generally speaking, Islamic law does not discriminate against women with reference to testamentary dispositions. A Moslem man or woman may dispose of his or her property by will subject to the one-third rule:

"Bequests which, singly or collectively, exceed in value one-third of the testator's net estate - i.e. the assets available for distribution after the payment of funeral expenses and debts - are ultra vires to the extent of the excess portion".[5]

This rule is common to all the schools of law. According to Maliki law, however, which, as previously noted, generally applies in the Northern States, a woman does not acquire legal capacity to deal with her property until she has consummated her marriage, and two qualified witnesses have testified that she is a prudent person capable of managing her own affairs. Moreover, it has been seen[6]

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1. Ibid.,p.145, par.218.
2. See e.g. among some ethnic groups in the Northern States of Nigeria; Meek, Northern Tribes of Nigeria, op.cit., p.283. Roth, Great Benin, op.cit.,Chapter IX, p.XIX.
3. Section 3.
4. Section 1(1).
5. Coulson, Succession in the Muslim Family, op.cit., p.235, Fyzee, op.cit., pp.359-363.
6. See above, Chapter XII.

that under Maliki law, a wife may not dispose gratuitously of more than one-third of her property without the consent of her husband. A Moslem wife's freedom to dispose of her property by will under Maliki law is therefore restricted to this extent. Where, however, a wife makes a testamentary bequest which is ultra vires due to the lack of her husband's consent, the bequest may be validated by the husband's subsequent ratification. Bequests to an heir are not valid.[1]

These rules, which are peculiar to Maliki law, also discriminate against women, and thus infringe the constitutional provision of the right to freedom from discrimination.

(111) Statutory provisions

Wills can be made in English form. Such wills are governed by the Wills Act, 1837,[2] as amended by the Married Women's Property Act, 1882,[3] and by the Wills Law, 1958[4] which only applies in Oyo, Ogun, Ondo, Bendel and Lagos States.

The introduction of English testamentary laws has changed the incapacity to make a will or to dispose of individually-owned property without restraint, imposed by customary and Islamic laws. Every sane adult Nigerian is now legally capable of making a will disposing of his or her individually-owned property in accordance with the statutory laws of succession stated above.[5]

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1. See Coulson, Succession in the Muslim Family, op.cit., p.247 and generally, Fyzee, op.cit.,p.366.
2. 7 Will. 4 and 1 Vict. C.26; 39 Stats. 856. In Thomas v. De Souza, [1929] 9 N.L.R.81, it was held that the English Wills Act, 1837 is a statute of general application in Nigeria, see also Adesubokan v. Yinusa [1973], 3 U.I.L.R. 22.
3. 17 Stats. 116.
4. Cap.133, Laws of Western Nigeria, 1959 Revision.
5. Adesubakan v. Yinusa [1973] 3 U.I.L.R.22.

With special reference to women, it may be noted that the English Wills Act, 1837, did not give testamentary capacity to a married woman, in contradistinction to a woman feme sole, who had full testamentary capacity under the Act. When the equitable concept of separate property was extended to the legal doctrine of separate property by the Married Women's Property Act, 1882, a married woman's power to dispose of her property by will was likewise extended, so that her testamentary incapacity remained only with respect to property acquired by her during coverture before 1883. The Married Women's Property Acts, as well as the Wills Act 1837 are statutes of general application,[1] and apply to all married women irrespective of type of marriage, except married women in Oyo, Ogun, Ondo, Bendel and Lagos States.

The Married Women's Property Law, 1959, which applies in Oyo, Ogun, Ondo and Bendel States,[2] gives testamentary capacity to married women, but, as previously noted, the Married Women's Property Law, 1959, does not apply to women married solely according to customary law (and presumably Islamic law). But the Wills Law, 1959, which applies in these States, unlike the Wills Act 1837, does not exclude married women from making valid wills. The position therefore is that all married women in these States have full testamentary capacity.

Since 1972, the Wills Law, 1959,applies in Lagos State,[3] and under this Law all married women have full testamentary capacity.

All Nigerian sane adult women, therefore, have full testamentary capacity, Islamic or customary law to the contrary notwithstanding.

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1. see Ogedegbe v.Ogedegbe [1964] L.L.R.209; Egunjobi v. Egunjobi [1974] 4 E.C.S.L.R.552; Osomugha v. Osomugha [1972] 12 C.C.H.C.J. 91; Thomas v.De Souza [1929] 9 N.L.R.81. Yinusa v. Adesubokan [1968] N.N.L.R.97.
2. See further, above, Chapter XII, p.366.
3. See Chapter XII, p.366, n.1.

Customary or Islamic laws which impose restrictions on the free disposal of individually-owned property by will are incompatible with the Wills Act 1837, the Married Women's Property Act, 1882 and the Wills Law, 1959. They have also been declared repugnant to natural justice, equity and good conscience in a few cases.[1]

In the recent case of Adesubokan v. Yinusa,[2] the trial Court held that a Moslem of the Northern State of Nigeria was competent to make a will under the Wills Act 1837, but that he had no right to deprive by that will any of his heirs who were entitled to share his estate under Islamic law. On appeal, it was held by the Supreme Court that the Islamic law which favours equal distribution despite the existence of a valid will, violates section 3 of the Wills Act, 1837, under which a testator can dispose of his property as he pleases. The Court held that section 34(1) of the Northern States High Court Law enjoins the High Court to observe and enforce the observance of every native law and custom which is not incompatible either directly or by implication with the Wills Act 1837,[3] and that the Moslem law which the trial Judge applied in the case was incompatible with the Wills Act, since the definition of native law and custom in Northern Nigeria includes Moslem law.[4]

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1. See Akuonyeume and Anor. v. Ogbanje [1964] Suit No. 0/98/1963, unreported, Onitsha High Court, 2 Nov. 1964.
2. [1973] 3 U.I.L.R. 22.
3. Contrast Rotibi v. Savage [1944] 17 N.L.R.77, where it was held by the Owerri High Court that the phrase "any law for the time being in force" in s.16 of the Protectorate Courts Ordinance, 1933 had reference only to local enactments. Compare the Supreme Court Act, s.17(1), Cap.211, Laws of Nigeria, 1948 Revision.
4. See also Okoro, op.cit.,p.226; Contrast Nwabueze who asserts that there can be no question of any customary limitation upon the freedom of testation being invalid for incompatibility with the Wills Act, 1837, since only incompatibility with a local statute can render such limitation invalid, - Nwabueze, op.cit., p.420.

In Akuonyeume and Anor.v. Ogbanje,[1] a case decided in Onitsha High Court in 1964, the plaintiffs claimed as executors named in the last will of the deceased testatrix, to a grant of probate in solemn form. The defendant, a grandchild of the testatrix's deceased husband, entered a caveat on the ground inter alia, that the testatrix could not dispose of the land which she had devised by will, since she had no capacity to dispose of it according to customary law, as she had not refunded the dowry paid by his grandfather when the latter married her. Kaine, J., found that the land in question was acquired by the testatrix after her husband's death and was therefore not her husband's family property. The testatrix had devised the land to her own children. The Judge held that the testatrix could deal with the land as she wished, and that although customary law may have applied to the property had she died intestate, it could not apply when she made a will. The learned Judge, it is respectfully submitted correctly observed:

> "I agree with Mr. Umezinwa [counsel for the plaintiffs] that if the Native Law and Custom would prevent a woman from dealing with property which she acquired with her own sweat, it would be repugnant to natural justice and good conscience, and therefore it should not be allowed to operate, in accordance with section 22 of the High Court Law of Eastern Nigeria, and to be given effect by this Court".

It is not possible to give details of the law of testate succession under the Wills Act 1837, within the context of this thesis, but the following pertinent points may be briefly noted:

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1. [1964] Suit No. O/98/1963, unreported, Onitsha High Court, 2 Nov. 1964; see also Okoye v. Okoye and Ors. [1976] Suit No. O/171/72, unreported, Onitsha High Court, 8 April, 1976 where Nnaemeke-Agu, J., held that the alleged customary law of Otolo Nnewi by which a father could not distribute his property by will to his younger children in disregard of the elder ones, and of his Okpala [head of the family], if it existed, was contrary to all the authoritative pronouncements on the point and unenforceable.

(1) Under section 18 of the Wills Act, 1837, every will made by a man or woman is revoked by his or her subsequent marriage.[1] All types of marriages are included under this section, but section 15 of the Wills Law, which provides for the revocation of a will by a subsequent marriage, expressly excludes marriages under customary law.[2]

(11) A gift to the testator's wife, provided this was obviously the testator's intention, will take effect in favour of a woman with whom the testator is living as husband and wife, even though they are not legally married.[3] The beneficiary must not have witnessed the will.

(111) A testator may, by a valid will, dispose of all his immovable and movable property. He may not, however, dispose of his interests in family property which has not been partitioned.[4]

(IV) Unlike the present English law, there is no legal provision which prevents a man or woman from disposing of all his individual property by will, even though this would leave his or her spouse, children and dependent relatives entirely penniless.[5]

C. Testamentary provisions for widows

A Nigerian can make provision for his wife, daughter or other relatives who may be deprived of any, or a sufficient share in his intestate estate, by making a will in accordance

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1. See Bromley, Family Law, op.cit.,pp.603-605; a decree of divorce or nullity does not affect a will made during the marriage. see the recommendation of the Morton Commission (1956 Cmd. 9678), pars.1187-1191, to the effect that in such a case a gift to, or appointment in favour of, a former spouse should lapse unless the testator expressly directs to the contrary.
2. For a criticism of this provision, see Obi, Modern Family Law, op.cit., pp.276-278.
3. See Re Brown [1910] 26 T.L.R. 257; Re Smalley [1929] 2 Ch.112, C.A.
4. See Oke and Anor.v.Oke and Anor.[1974] 3 S.C.1; Davies v. Sogunro and Ors.[1936] 13 N.L.R.15; Ogunmefun v. Ogunmefun and Ors.[1931] 10 N.L.R.82; Taylor v. Williams and Anor.[1935] 12 N.L.R. 67.
5. Cf. the English Inheritance (Provision for Family and Dependants) Act, 1975, 45 Stats.493; see also Bromley, op.cit.,pp.622-636; Unger, "The Inheritance Act and The Family", op.cit.,p.215.

with the Wills Act 1837 (or the Wills Law, 1959 in those States where it applies). It has been seen that, with the exception of Islamic law under which a wife may inherit some part of her deceased husband's property, a wife married under customary law does not inherit any property from her husband, and in most communities, daughters are likewise excluded. To what extent do husbands and fathers make provision for such wives and daughters in their wills?

It is a known fact that Nigerians generally are reluctant to make wills.[1] It is difficult to estimate, and account for the unpopularity of wills, as numerous factors may contribute to this result. Thus, apart from the character of the law of intestate succession, the distribution of wealth, the incidence of family property, and the character of matrimonial law, the expense of making wills, the complexity of the rules relating to formalities, proof and interpretation, and the high rate of illiteracy in Nigeria must be considered. Much of their reluctance may be due to the fact that in customary law, wills take the form of death-bed dispositions. Making a will when a person is in good health therefore creates the illusion of impending death, and may be regarded as tempting the Gods. One interviewee who suspected that her church marriage may be invalid under section 33 of the Marriage Act,[2] and as a result she would have no share in the intestate estate of her husband, declared her determination to see that her

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1. See Okoro, op.cit.,p.64; Childs, "Christian Marriage in Nigeria", op.cit., p.246. There is evidence of the unpopularity of wills in other societies, see e.g. Maine, Ancient Law, op.cit., p.244: "in France at moment, the heads of families generally save themselves the trouble of executing a will", confirmed by the recent observations of Amos and Walton, Introduction to French Law, quoting Josserand, Cours de Droit Civil Possitif Francais 1930, that "in 1928 about four-fifths of all successions were intestate". See also J. Unger,"The Inheritance Act and the Family," Modern Law Review, 1943, pp.215-228at p.217; Cretney, Principles of Family Law, op cit.,p.294; The privilege of freedom of testation is exercised comparatively rarely: only 24 percent of a representative sample of husbands and 10 percent of wives had made wills..."

2. See above, Chapter X, p.145.

husband went through another ceremony in the Registrar's office, which would validate the marriage, but she rejected the idea that he could make a will leaving her a share of the property to which she had contributed the greater part, but which was entirely in his name. She said that it would be very cruel to make such a suggestion to him, as it would imply that she was desirous of his death.

The Registrar of Calabar High Court stated that the total number of wills submitted to the Probate Registry of the High Court in Calabar was not more than fifty. When it is realised that the Wills Act, 1837, was introduced as early as 1900, in Nigeria, and that Calabar Division had a projected population of 300,973 of whom 147,476 were aged 20 and above in 1971, it can be appreciated that very few people make wills. There is no reason to believe that people in other parts of the country with the possible exception of Lagos follow a different practice in this respect.

The question still remains, however, how far do people who make wills provide for their spouses or children? The present writer examined 66 wills at the Probate Registry, Lagos High Court. The contents of these wills were very interesting. Not only were they illustrative of the attitude of Nigerian husbands towards making provision for their wives, but they gave great insight into marital relationships, and demonstrate the fact that the English law of intestacy, whereby widows inherit a large share of their husbands' property is not popular with most Nigerian husbands.

Of the 66 wills examined, one was made by a woman. Thirty six of the men had one wife only when the will was made, and four had three or more wives. In only two cases were wives given any property absolutely, except small sums of money. In one of these cases, the wife was made joint executrix, and was given most of the husband's property, including rents from family property due to him. In the other case, the wife and children were given equal shares in all personal property, and the wife was given a life

interest in all real property, the remainder to the children. It is worthy of note that this testator was illiterate.

The general tendency in the other wills was to give the widows as little as possible, and to deprive them even of that in the case of remarriage. For example, one will contained the following provision:

> "I devise my family house on trust for the occupation of my three wives now living with me. From the rents collected my senior wife should be given £3 monthly, the second wife £2 monthly, and the third wife £1.10 monthly for life. I direct that should any of my said wives remarry, or desire to take a husband, or keep a new friend, then such wife or wives should forthwith leave my house and her monthly allowance shall cease".

This testator died leaving a number of landed properties. He devised a large area of land at Itori town to his niece, and another land to his son, while the remainder of his property was to be held in trust for the benefit of his eleven children.

Similarly, another testator provided:

> "Any of my male children and wives are permitted to live at the rear of my house at No. 30 Little Road, provided that no wife of mine shall enjoy this privilege if she shall remarry".

He too left a large amount of property to his children, except one "daughter Adefwora who shall have no share whatever in my real, personal or residual property". Nothing else was left to his wives. Another will gave the wife £50 as an outright gift, and the right of occupancy to her room, but she was to be "dispossessed of her room unless she remained chaste".

Such meagre provisions merit no comment if the will reveals the hostile attitude of the testator towards his wife. For example, where a testator directed his executors

> "to pay out of my estate, a sum of £10 only to my wife Madam Abigail Ojuolape as her bequest and only share of my estate, and no more no less. By doing this I have deliberately left out her name from all other shares and privileges and she is conscious of the reason I have done so".

It was evident that the wife had done him some wrong, real or imagined. Similarly, where a testator directed

that his wife Emily should immediately evacuate his house on the occurrence of his death, his resentment of his wife's presence in his house is obvious. No imagination is necessary to interpret the feelings of a testator who made the following provision:

> "I have by my will made no provision for my wife Rachael -, in as much as she has been adequately provided for by her earnings as a principal of a school upon salary £1,260 in 1969. Since this woman has been so cruel to me, deserting me for no just cause at my hours of need and poverty barely three years after our marriage, in May 1951, and have tried even though unsuccessfully in 1964 to get the marriage dissolved in a petition brought by me, Suit HD/9/64, I feel justified in leaving her the sum of £5 which is more than she deserves".

In cases where there is such open hostility on the part of the husband, one would not expect a widow to be given much, if anything. But many widows for whom the testators profess love and gratitude, fare little better. For example, a will contained this provision:

> "I direct that if my good natured wife Madam Rabiatu Olabiwonno has no issue for me, she be given the sum of £10 for her honest services to me during my lifetime. My thanks to her for her honest deeds".

The testator gave £5 to his other wives, including a wife who had left him, if she returned to him before his death, "if not her £5 should be deleted, and any new wife added". But the bulk of his large estate was devised to his five daughters, and one son, and a large property was given to a brother and his children. This will was made in 1972 when £10 could not maintain someone for a month, much less a life-time. Rabiatu did not get much for her honest deeds!

Most of the property in the wills examined was given to the children of the testator, especially the daughters. Very often, daughters were given a larger share, to the detriment of sons. In quite a few cases, the testator excluded the spouses of his children from inheriting his property. An example of such a provision is provided by the following provision in a will:

> "I direct that all gifts to my daughters and sons should be free from all matrimonial engagements and should under no circumstance be inherited by any person claiming to be the wife or husband, legally, or otherwise of any of my daughters or sons. Any daughter or son dying without issue, his interest shall merge in my estate for the benefit of my other children, grandchildren or great grandchildren".

One testator provided that his eldest son "should not take dowry in the traditional way" when his twin daughters marry, and that none of his debtors should be sued. The first provision seems strange, since the testator was a Chief, the Aihioba of Benin, whose duty it is to uphold traditional law. It would have been interesting to know his reasons for the provision.

The point of immediate relevance of this thesis, however, is that deceased husbands do not make adequate provisions for their widows in their wills, even where they leave a considerable amount of property, and their wives have been helpful and faithful.

Under English law at present, the deceased's spouse or a former spouse, that is, a person whose marriage with the deceased was dissolved or annulled during his lifetime by a competent Court, and who has not remarried, is entitled to apply to a court for reasonable maintenance out of the estate.[1] There is no such provision in Nigerian law.

4. Problems of Conflict of Laws

The effect of a statutory marriage on the customary and Islamic laws of succession portrays some of the conflicts inherent in a legal system where two or more distinct types of marriages co-exist. Most of the problems arise from the fact that there are no statutory provisions governing the choice of law in succession in some parts of the country. Judicial decisions are conflicting, and as a result, it is impossible to state with any degree of certainty whether

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1. See s.25(1) Inheritance (Provision for Family and Dependants) Act, 1975, 45 Stat.,493.

English, or customary law (including Islamic law) governs the intestate estate of a person, subject to customary law, who has contracted a statutory marriage which is not governed by section 36 of the Marriage Act[1] or section 49(5) of the Administration of Estates Law, 1959.[2]

This section attempts to examine briefly some of the conflicting theories and decisions, in order to make some contribution to the solution of the problem.

A convenient starting point is Cole v. Cole[3]. As previously seen, this case decided that in such circumstances English law should be applied. This decision was followed and extended in later cases. The theory inherent in these decisions is that the law of intestate succession of a person subject to more than one type of law is determined by the type of marriage he contracts. That is, there is an important nexus which should not be disregarded, between the law of marriage, and the law of succession. The intestate estate of a person who marries according to customary law should not be distributed according to English law. Similarly, the intestate estate of a person who contracts a statutory marriage, which entails rights and obligations patterned on English law, should not be distributed in accordance with the customary law of succession, since some of its incidents are incompatible with the status of a statutory spouse.

This viewpoint has been criticised by writers who see succession and marriage as two independent and unrelated institutions. Thus Okoro says that the "law of succession is a separate body of law, quite distinct from the law of marriage. The law of succession deals mainly with the distribution of a deceased's property, and to a measure the discharge of some of his obligations", whereas

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1. Cap.115, Laws of the Federation of Nigeria, 1958 Revision.
2. Cap.1, Laws of Western Region of Nigeria, 1959 Revision.
3. [1898] 1 N.L.R.15.

> "the law of marriage regulates the relationship between husband and wife in their lifetime. It imposes on them matrimonial rights and duties".[1] Therefore, the learned writer argues:
>
> "a wife's right in her husband's intestacy, where they exist, arise from the fact that the law of intestate succession provides that a wife should be entitled and not from the fact of marriage itself".[2]

Nwabueze has correctly pointed out that:

> "this argument involves the fallacy of treating rules of law as belonging to watertight compartments. The law is one organic body of rules, operating within a more or less consistent framework and its compartmentalisation is no more than a device of convenience to facilitate its exposition and study".[3]

In fact, marriage is a relationship which is central to many other legal institutions, which in turn determines rights to succession. For example, legitimacy, in nearly all legal systems in Nigeria, is dependent on whether the child's parents were married at the time of its conception, and this fact alone, in many systems, admits the child of the wife to inherit the husband's property, although there may be no blood relationship between him and the child. It is not paternity which admits such children to succession, it is marriage.[4]

Coker correctly sums up the position when he states:

> "It is generally supposed that there is no status of illegitimacy in native law and custom: this, however, is not correct, for there is a status of illegitimacy as opposed to that of legitimacy. The latter entitles the subject ipso facto to succeed to property; the former disentitles the subject from so succeeding, unless his rights are 'legalised by an acknowledgement of paternity'. Generally speaking

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1. See Okoro, op.cit., pp.182-3; see also the submission of Shyngle, who argued on behalf of the respondent in Cole v. Cole [1898] 1 N.L.R.15 at p.17, that the "status of marriage does not necessarily affect succession; see also Coker, Family Property Among the Yorubas, op.cit., pp.287-288.
2. Okoro, op.cit., p.188.
3. Nwabueze, Nigerian Land Law, op.cit., p.407.
4. See further, Chapter VII, above, pp.

> a child born in wedlock is legitimate from birth, whereas an illegitimate child can only be legitimated if he was duly acknowledged by his father".[1]

The role of marriage in the choice of law of succession cannot be fully realised when there is only one type of marriage in any society. Where there are two or more types of marriages entailing different legal incidents and status, rights of succession may often depend on the type of marriage contracted. This fact can be illustrated from customary law where instances abound, but two will suffice to support the contention.

Okoro correctly states that "among the Ijaw it is important to know the type of marriage entered into by a person's parents, as this determines the family in which a person may succeed to property".[2] By this statement the learned writer has demolished his own argument that marriage and succession are independent and unrelated institutions. Among the Ijaws there are two types of marriages, the iya ("big dowry"), and the igwa ("small dowry") marriage.[3] Each type of marriage among the Ijaw involves different rights, and imposes different liabilities on the spouses. As a result, the type of marriage determines the inheritance right of the wife and children of the marriage. Okoro sums up the position thus:

> "The iya marriage is more expensive than the igwa marriage. The children of the former marriage belong to their father's family and their mother belongs to her husband's family. It is in this family that she and her children have succession rights and are succeeded to as well. The children of the igwa marriage belong to their mother's family and their mother too belongs to her father's and not to her husband's family during the marriage. She and her children have succession rights in and are succeeded to by her father's family. In determining succession rights among the Ijaw, it is therefore essential to know the family to which a person belongs".[4]

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1. Coker, op.cit., p.266.
2. Okoro, op.cit., p.149; see also Meek, Land Tenure and Land Administration in Nigeria and the Cameroons, op.cit.,p.179, n.4; Nwogugu, Family Law in Nigeria, op.cit., p.315.
3. See above, Chapter III, pp.254-257.
4. Okoro, op.cit.,p.149; see also Bride Price Committee Report, p.34. Footnote 4 continued.....

In determining succession rights among the Ijaws, it is therefore essential to know the type of marriage contracted by the spouses. The type of marriage determines, not only the succession rights of the spouses and their children, but also of their fathers, brothers, and other relatives.[1]

Similarly, the inheritance rights of the issue of a person who contracts a levirate marriage and a non-levirate one depend on the type of marriage contracted by their parents. For example, A contracts a levirate marriage with B, his deceased brother's wife, and a non-levirate marriage with C. The children of A and B will inherit from the deceased brother, whereas the children of A and C will inherit from A. In other words, A's children's rights of inheritance are dependent on the type of marriage A contracted with their respective mothers.[2]

There are some societies where rights of succession are independent of marriage. For example, among the Fanti of Ghana, where the eldest son of a man's sister inherits all his property, regardless of whether he is married or not, or the type of customary marriage he contracts. This situation invariably applies among matrilineal societies, where affiliation of children and inheritance rights are not usually dependent on marriage.[3] But matrilineal societies are relatively few in Nigeria, and in any case, reference to these societies cannot substantiate a general statement that the law of succession is entirely independent of the law of marriage in Nigeria.

Footnote 4 continued..... Temple, Notes on the Tribes... of the Northern Provinces of Nigeria, op.cit., p.250; As a result of the conflict of interests in the two types of Ijaw marriages with reference to succession and other rights, Ijaw fathers are reluctant to give their daughters' hand in an "iya" marriage.

1. Okoro, op.cit., p.150.
2. See further, above, Chapter VIII, p.681.
3. See Daryll Forde, "Double Descent Among the Yako", in African Systems of Kinship and Marriage, edit. by Radcliffe-Brown and Forde, op.cit.,pp.310-314; Nsugbe, Ohaffia: A Matrilineal Ibo People, op.cit.,p.86-92. Meek, Land Tenure and Land Administration, op.cit., p.179.

It is respectfully submitted that the theory inherent in Cole v. Cole,[1] and the cases which followed this decision is the correct one, and that the distribution of the intestate estate should be in accordance with the type of marriage contracted.

Some judicial decisions have accepted the basic premise of Cole v. Cole[2] and other similar decisions,[3] that English law applies to the intestate estate of persons subject to customary law, who have contracted statutory marriages. They, however, insist on the flexible approach, in the absence of a specific statutory provision. In the application of English law, full cognizance must be taken of the intention and expectations of the parties, as portrayed by their manner of life, standard of education and social position. This theory, aptly termed the "manner of life" approach, was adopted in Smith v. Smith,[4] a case similar in facts to Cole v. Cole.[5] The husband had contracted a Christian marriage in Sierra Leone; he died intestate in Lagos, leaving a house there. He was survived by his wife and three children. The children and their mother lived in the house after his death, in much the same way as they had done when he was alive. After the death of the widow, the children continued in residence, until a dispute broke out and the only son claimed exclusive right to the house. The daughters brought an action for partition of the property, based on customary law. The son resisted their claim on the ground that since the deceased had

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1. [1898] 1 N.L.R.15.
2. [1898] 1 N.L.R. 15.
3. See Adegbola v. Folaranmi [1921] 3 N.L.R.81; Haastrup v. Coker [1927] 8 N.L.R. 68; Gooding and Anor.v. Martins [1942] 8 W.A.C.A.108; Coker and Ors.v. Coker and Ors. [1943] 17 N.L.R.55; Olympio and Anor.v. Oluwole and Anor. [1968] N.M.L.R.469.
4. [1924] 5 N.L.R.102.
5. [1898] 1 N.L.R.15.

contracted a Christian marriage, based on Cole v. Cole,[1] he, as the eldest son, was heir at law, and as a result exclusively entitled to the house under English law.

Van Der Meulen, J., rejected the argument that Cole v. Cole[2] laid down a general principle that English law of succession must apply in all cases of intestacy where the deceased had contracted a statutory marriage. He held that the fact that a man had contracted a marriage in accordance with the rules of the Christian Church may be very strong evidence of his desire and intention to have his life generally regulated by English law, but it is by no means conclusive evidence. He concluded that the fact that the deceased, when he bought the house, had probably intended it to be a family house, and the fact that after his death, the family had treated it as such, as sufficient evidence to rebut the presumption. He said:

> "I have seen the parties in Court, and, although the defendant has had some little education to qualify him to be a clerk, it would I consider be most inequitable to hold that the affairs of people such as these should be strictly regulated in accordance with the principles of English law".3

Cognizance was thus taken of the appearance and education of the inheritors, totally irrelevant considerations, in deciding whether English law or customary law should be applied. Fortunately, justice was done in this particular case since all the children shared the house, but if the parties had been Igbos, instead of Yorubas, the daughters would have been excluded.

In Ajayi v. White,[4] the fact that the deceased wife of an "educated Reverend gentleman" might have been illiterate herself, and might have known nothing about English law, since she left no will,[5] was enough evidence

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1. Ibid.
2. Ibid.
3. Smith v. Smith [1924] 5 N.L.R. 102 at p.105.
4. [1946] 18 N.L.R.41.
5. Most educated Nigerians do not in fact make wills; see further above, pp. 475-479.

to justify the application of customary law to her intestate estate.

Salacuse has remarked that

> "....in a country such as Nigeria where a person's way of life very often includes elements of the European and traditionally African in varying proportions, one can easily imagine the enormous and almost insoluble evidentiary problems which could confront a judge required to decide whether a deceased's manner of life was such to warrant the application of customary law".[1]

The "mode of life" and "standard of education" tests have been largely discredited as totally unacceptable and inappropriate.[2] It is obvious that they can lead to great injustice and incongruities in certain cases. For example, if pursued to their logical conclusion, the intestate estate of a person married according to customary or Islamic law to one wife only, and who has attained a high standard of education and social standing, and adopted an English way of life, would be distributable according to English law.[3]

Most of the criticisms directed against the choice of English law to govern the intestate estate of deceased spouses of a statutory marriage, who are subject to customary law, centre around the fact that in English law, the wife inherits some part of her deceased husband's intestate estate, whereas in customary law she is excluded entirely. Thus Obi gives as an example of the iniquities which might result from the application of English law, the possibility of a widow who inherits practically every penny of her husband's disposable estate leaving the family and remarrying without honouring certain familial obligations of the deceased.[4] Such

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1. Salacuse, Birth, Death and the Marriage Act, op.cit.,p.65.
2. Ibid.,p.65 et.al; Nwogugu, Family Law in Nigeria, op.cit., p.208.
3. See Bolajoko v. Layeni [1949] 19 N.L.R.99, where Rhodes J. rejected a claim that English law governed the intestate estate of a person who had never contracted a Christian marriage, on the ground that it revealed a gross ignorance of the law.
4. See Obi, Ibo Law of Property, op.cit., p.218.

a possibility, however, is not confined to widows, and may apply equally in the case of widowers who have inherited their deceased wife's property by virtue of the application of English laws. English laws of succession applicable in Nigeria may be more beneficial to a widower than to a widow.[1]

It serves no useful purpose to cite isolated examples, rare within Nigeria's social context, where individuals may take advantage of a rule of law, to justify its abolition. The exclusion of widows from inheritance rights in their deceased husband's intestate estate is incompatible with the social attitudes of modern society.

5. The Administration of Estates

The administration of the estate of a deceased person is a function known to both customary and English law.[2] If the deceased has not appointed an executor, administrators are usually appointed by the courts to administer and distribute the estate to persons entitled to inherit. Where the deceased contracted a statutory marriage, or made a will in English form, his estate will usually be administered according to English law. In such cases, the widow of the deceased usually has priority to a grant of letters of administration, since more often than not she is one of the principal inheritors.[3]

The right of a widow of a statutory marriage to administer the estate of her deceased husband has long been recognized in Nigeria.[4] Where the widow has been married

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1. For example, on the death of a wife intestate her husband, if he survives her, is entitled to a life interest in the whole of her real property, both legal and equitable, in certain circumstances. This right, known as curtsey, is not available to a surviving widow; see further, Nwabueze, op.cit.,p.413.

2. See Nwabueze, Nigerian Land Law, op.cit.,p.429; Odje, "Integration in the Field of the Law of Succession in the Mid-Western Region of Nigeria", in Integration of Customary and Modern Legal Systems in Africa (Ile-Ife, Nigeria, University of Ife Institute of African Studies, 1971), p.277; Meek, Northern Tribes of Nigeria, op.cit., p.285.

3. See Re Ata (deceased[1930] 10 N.L.R.65; Taylor v. Taylor [1960] L.L.R.286; Bolaji v.Akapo [1968] N.M.L.R.203

footnotes 3 and 4 continued.....

according to customary law, however, the position is far from clear and there are conflicting decisions. Customary law follows English law in making the right to administer the estate dependent on the right of inheritance to it. In customary law a wife does not inherit her deceased husband's property on an intestacy. As a result, it has been held in several cases that the widow of a customary law marriage cannot administer her deceased husband's estate. Butler Lloyd, J., in the case of In Re Ata,[1] noted:

> "The grounds on which the English Courts have usually preferred the widow are quite inapplicable to a system of polygamy and the word widow should, I think, he construed as meaning the widow of a Christian marriage".

More explicit reasons for the exclusion of widows of a customary law marriage from administration of their deceased husbands' estates were given in the case of Aileru and Ors. v. Anibi[2] The defendant's uterine brother died leaving minor children of four mothers married to him under customary law. All the widows were allotted to members of the deceased's family, but three of them left the men to whom they were allotted and took other husbands. The fourth widow, who was allotted to the defendant, remained with him. The defendant applied for letters of administration to the deceased's estate. The three widows, as next friend of their children, entered a caveat against the defendant's application. Jibowu, J., noting that the children were all issues of polygamous marriages according to native law and custom "which treats their mothers like chattels to be inherited on their father's death", declared:

Footnotes 3 and 4 continued....

3..... Administrator General v. Coker [1942] 16 N.L.R.111.

4. See Re Ata (deceased) [1930] 10 N.L.R.65; Aileru and Ors. v. Anibi [1952] 20 N.L.R.46.

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1. [1930] 10 N.L.R.65, at p.66.

2. [1952] 20 N.L.R.46; Cf. Rafatu Morin and Ors. v. Yewande Soyemi [1973] 3 U.I.L.R.428, at p.430; where it was held that normally a surviving spouse is entitled to a grant solely or with some other persons depending on her beneficial rights, but that the claim of a spouse in a polygamous setting are not so strong as they would be under the Marriage Act.

> "Under native law and custom widows cannot administer the estate of their husbands. In my view that is the first objection to a grant of letters of administration to the four widows of the deceased in this case".

The Judge gave as additional objections the fact that the widows were illiterate, and therefore not in a position effectively to discharge the duties of an administrator, and that they were not living together and therefore could not work together. The fact that they had not brought the action in unison, as the fourth widow did not consent to her name being used in the action, was also an objection to the grant being given to them. The overriding objection, however, seemed to be that they had not "the same status under native law and custom as wives of marriages under the Marriage Ordinance".

Some of the criteria used to exclude the widows were unjustifiable. It is respectfully submitted that the illiteracy of the widows was not a rational ground for their exclusion. Male applicants are not excluded from administration of an estate because of their illiteracy. Moreover, many illiterate widows of a statutory marriage have been granted letters of administration.

The principle that the widow of a customary marriage cannot administer the estate of her deceased husband has been followed in other cases.[1]

There are many cases, however, in which the court did not act on such a principle. Thus Wickliffe, J., in the case In the Matter of the Estate of Joseph Asaboro,[2] appointed one Comfort Asaboro, the widow of a customary law marriage, as one of the two administrators of the estate of

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1. See e.g. Obi and Anor. v. Obi and Anor.[1974] Suit No. E/21M/73 unreported decision of the High Court Enugu, decided on 6 Feb. 1974, where the partiality principle was applied to justify the refusal of a grant to one of the widows of the deceased and the member of the family to whom she had been allotted. See also Tapa and Anor. v.Kuka [1945] 18 N.L.R.5; Bolaji v. Akapo [1968] N.M.L.R.203; Ejiamike v. Ejiamike and Ors. [1972] 2 E.C.S.L.R.11.

2. [1974] 1 W.S.H.C.41; Cf. Akanmu v. Abike [1971] Law Notes & Review 1971, No. 1, p.6.

her deceased husband. In the recent case of Oshilaja and Anor.v. Oshilaja and Ors.[1] Odesanya, J., said:

> "The first defendant in the present case is an educated woman. I think Yoruba sentiment would now frown upon the idea of the exclusion of this loyal and industrious wife from the administration of the intestate estate of her deceased husband".

The Judge accepted the evidence of Oba Adekogbe, that in Yorubaland a woman married under native law and custom could administer the estate of her deceased husband as compatible with the principle of "natural justice, equity and good conscience". This decision was a particularly just one in view of the fact that the widow was the joint owner of the money, the real properties, and stock in trade left by the deceased.[2]

It is difficult in the context of present day Nigeria to justify the exclusion of wives of a customary law marriage from the administration of the estates of their deceased husbands, especially where there is only one widow, or where relations among the widows are cordial and no interests would be jeopardised.

The decisions which exclude widows of a customary marriage from participating in the administration of their deceased husband's estates are illogical[3] irrational, and based solely on the erroneous conception of a wife of a customary marriage as being an inheritable chattel, because presumably dowry has been paid on her behalf. The absurd situation therefore arises in which an illiterate wife of

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1. [1972] 10 C.C.H.C.J.11, see also George and Anor. v. Fajore [1939] 15 N.L.R.1 and Re Whyte [1946] 18 N.L.R.70.
2. See also Administrator General v. Coker [1942] 16 N.L.R.111 where a mother acting as guardian of her eleven year old child, was made joint administratrix as against the plaintiff, even though the mother had been divorced from the deceased.
3. See e.g. In Re Ata (deceased) [1930] 10 N.L.R.65, "The ground on which the English courts have usually preferred the widow are quite inapplicable to a system of polygamy and the word widow should, I think, he construed strictly as meaning the widow of a Christian marriage", per Butler Lloyd, J. He refused to grant letters of administration to the customary law widow, but accorded a grant to the deceased's sister. See also Martin v. Henshaw [1935] 12 N.L.R.40.

a statutory marriage is adjudged competent to administer her deceased husband's estate,[1] but a university graduate who is the widow of a customary marriage is not. The absurdity becomes more apparent when a woman who may be granted letters of administration to the estate of a deceased relative is adjudged incapable of administering her husband's estate to which she may have made significant contributions.

More important, the decisions are not in accordance with the current practice in many parts of Nigeria, for example Onitsha, where competent women are chosen to administer a deceased person's estate in preference to less competent men. The decisions are also apparently not in accordance with the practice of many probate registries. For example, of 34 notices of prospective grants of letters of administration advertised in a national Nigerian newspaper,[2] the letters of administration were to be granted as follows:

15 grants to the widow and another male person in each case;
3 grants to the widow and other female persons;
2 grants to the widower and another person;
2 grants to the widow only;
1 grant to two widows (of the same husband) only;
8 grants to males only;
2 grants to females only, (not widows);
1 grant to the mother and brother of the deceased.

Only three of the thirty-four deceased persons were women.

From this evidence it seems clear that widows are usually and rightly granted letters of administration to their deceased husband's intestate estates. The exclusion of widows from the administration of their deceased husband's

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1. The present writer has advised a few such widows who had been granted letters of administration to their deceased husband's estates.

2. Daily Star, 5 November, 1977, p.10.

estate solely on the ground that they are women or that they are widows of a customary marriage, patently infringes the right of freedom from discrimination on the grounds of sex,[1] since neither men generally, nor widowers of customary marriages, are so excluded.

6. Summary and Conclusion

A. Summary

Because of the wide divergences in the property rights of Nigerian wives under the various types of Nigerian law, it is difficult to summarise briefly the legal status of women with reference to property. The property rights of married women depend to a large extent on the type of marriage contracted. Generally speaking, a woman who is married under customary law has the least legal rights, and in some societies the wife of a customary marriage suffers severe discrimination in her legal capacity to acquire, own, or dispose of property, especially immovable property. With the notable exception of the Yorubas and a few other societies where women, including married women, have full legal capacity, equal to that of men, to acquire, own and dispose of their separate property without restrictions, most traditional Nigerian societies deprive a married woman of the right to own or to dispose of property. All property acquired by the wife is legally vested in the husband, and the wife cannot dispose of it inter vivos or by will, except with the consent of her husband.

In nearly all societies, including the Yorubas, a widow is deprived of inheritance rights to the estate of her husband if he died intestate, although in many societies her husband inherits her property if she predeceases him

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1. See s.39 of Constitution of the Federal Republic of Nigeria (Enactment) Decree, 1978, and further, Chapter II, p.148.

whether she leaves children or not. In most cases her testamentary capacity is severely limited.

Under Islamic law, the wife has a legal right to acquire and own all types of property. However, she cannot dispose gratuitously of more than one-third of her property without the consent of her husband, inter vivos or by will.

The widow of a marriage under Islamic law is entitled to inherit one-eighth of her husband's intestate estate if the husband dies leaving a child or an agnatic grandchild. In the absence of a descendant the widow inherits one-quarter of the intestate estate. However, in the case of polygamous marriages the wife's share is a collective one, and all wives are entitled to the one-eighth or one-quarter of the estate as the case may be. The husband cannot by will deprive the wife of her right of inheritance.

The husband on the other hand is legally entitled to one-quarter of his wife's intestate estate if she left descendants, and in the absence of descendants he inherits one-half of her estate. She cannot deprive him of his right of inheritance by disposing of her property by will.

The wife of a statutory marriage is in the most favourable position. Her legal rights with regard to the acquisition, ownership and disposal of property are almost identical with those of her husband. She also has an equal right to a share of his intestate estate, as he has to hers. Either spouse can make a will depriving the other spouse of his or her rights of inheritance.

As far as property rights are concerned, the introduction of the Married Women's Property Acts has revolutionized the position of women married according to customary law in some societies, and to a lesser extent, the position of wives under Islamic law. Under the Married Women's Property Act 1882, which applies to all married women in Nigeria, (except in Ogun, Ondo, Oyo and Bendel States where they are excluded, if they contracted a customary or Islamic law marriage, by the Married Women's Property Law, 1959), married women are capable of acquiring,

holding and disposing by will or otherwise of all types of property, which a man can legally acquire, hold or dispose of.

Additionally, the recent Land Use Decree, 1978, makes no distinction on the ground of sex to the rights of occupancy to land recognized under the Decree. Coupled with the right of freedom from discrimination on the ground of sex which is now entrenched in the Nigerian Constitution, it is doubtful whether the discriminatory provisions of Islamic law and some systems of customary law are legally enforceable.

B. Conclusion and recommendations

From the above summary it may be said that generally, the legal status of Nigerian women with reference to rights to acquire, hold, or to dispose of property compares favourably with men's rights in these respects. The law is in accordance with the actual practice of the people in most communities. Women now assert their rights to own and dispose of their self-acquired property, without restriction from their husbands, and this tendency will increase as more and more women become educated and active in the modern economy.

The inheritance rights of women, however, are far from favourable, with regard both to intestate and testate succession. Many women contribute to property which is invariably vested in the husband's name. In many cases, this is due to the fact that the wife has little or no education and less knowledge of the law. If her husband predeceases her, unless he has made adequate provision for her in a will (a rare event), she is dependent on the goodwill of her children or her husband's relatives who inherit his property. This may be the case even where she is married under the Nigerian Marriage Act, since the law is uncertain and judicial decisions are conflicting.

The sanctions which operated in the traditional society to force the deceased's heirs to take care of a widow no longer obtain, and remarriage of a widow by a member of

the deceased's family is relatively rare in contemporary Nigeria. The widow may not like the person chosen by the family to remarry her, and yet this is often the only means by which she can benefit from property which has been accumulated with her help. She may be given a choice - Hobson's choice - to be inherited, or abandon all her claims on the family.

In view of all these considerations the following reforms are suggested:

(1) The property rights of women should be made to accord with the principle of equality of rights which is entrenched in the Constitution of the Federal Republic of Nigeria, 1979.

(2) In accordance with the principle of equality of rights between men and women as embodied in the Constitution State, Governments should take steps to abolish existing discriminatory laws and customs. All aspects of the law which contribute to the low status of women, or which lead to women being regarded as property that could be bargained for or "inherited" should be abolished, or at least rendered legally ineffective. These include, principally, the payment of dowry as a legal essential of a marriage and the refund of dowry as the sine qua non of a valid divorce.

The law whereby widows are inherited by male members of the deceased husband's family should be abolished. The widow should be given a real choice of spouse and this can only be done by changing the law of intestate succession so as to enable the surviving spouse to inherit some portion of the deceased spouse's estate.

The present situation whereby a person is legally free to dispose of all his or her property by will without making adequate provision for a surviving spouse or spouses, or other dependants should be amended so that adequate provision can be ordered by a court where it is just and equitable to do so. In this respect the English Inheritance (Provision for Family and Dependants) Act, 1975,[1] which

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Footnote 1 on next page.....

came into force on 1 April, 1976 provides some useful guidance. Under the Act, the deceased's wife or husband, a child of the deceased including his illegitimate child, any person whom the deceased had treated as the child of the family in relation to any marriage to which he had at any time been a party, and any person who was being maintained, either wholly or partially by the deceased immediately before his death, for whom reasonable provision had not been made by the deceased's will or the law relating to intestacy (or the combination of both), are entitled to apply for an order for maintenance.[2]

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1. 45 Stats.493; this Act repealed the Inheritance Family Provision Act 1938, the Intestate Estate Act, 1952 and other relevant legislation, and replaced them by a new and comprehensive code.

2. See the recommendations of the English Law Commission which examined the whole question of family property law. Law Commission (Law Com. No. 52) First Report on Family Property,op.cit.; Law Commission (Law Com.No.61) Second Report on Family Property: Family Provision on Death, 31 July, 1974; see further, Bromley, Family Law, op.cit.,pp.622-635.

PART FIVE

CHAPTER XIV : CONCLUSION

CHAPTER XIV

CONCLUSION.

"Women do wrong to complain of the inequality of man-made laws; this inequality is not of man's making, or at any rate "it is not the result of mere prejudice, but of reason".

Jean-Jacques Rousseau.[1]

1. Introduction:

In the foregoing chapters an attempt has been made to collect and collate available evidence relevant to the legal status of Nigerian women in relation to marriage and family life, reinforced by the findings of field-work conducted for the purpose of this research in selected diverse areas of Nigeria.

Women's status in the formation, incidents, and dissolution of marriage, as well as their rights to property during marriage and on its termination in each of the various legal systems in Nigeria, have been examined in some detail.

The main focus of the study centered on the comparison of the legal status as defined[2] of husband and wife in marriage in contemporary Nigerian communities. In order to appreciate the present position, and to develop proposals for future legislative reforms, however, reference was made to the legal status of women in traditional communities. Comparisons with the legal status of women in other countries, especially English women, at various periods of their cultural develoоment have also been an important part of this study.

The main objects of this short concluding chapter are to assess the evidence relating to women's status, and to indicate areas of the law where reform is needed. However, a vital preliminary question arises: how does one assess in

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1. Emile, Trans. by Barbara Foxley (London: Everyman's Library, 1976), p.324.
2. See further, Chapter I, p.102.

general the status of women in any given society?

Anthropologists have used varying measuring rods for determining whether women's status is high or low. Thus, Ortner[1] speaks of the three factors by which women's position in society can be measured, and sums them up as:

" (1) elements of cultural ideology and informants' statements that explicitly devalue women according them, their roles, their tasks, their products and their social milieux less prestige than are accorded men and the male correlates;

(2) symbolic devices, such as the attribution of defilement, which may be interpreted as implicitly making a statement of inferior valuation;

(3) social-structural arrangements that exclude women from participation in or contact with some realm in which the highest powers of the society are felt to reside".[2]

Lowie correctly warns that great caution must be exercised in summing up the status of the female sex in a given society. He observes:

"The conditions involved in the relations of men and women are many-sided and it is dangerous to overweigh one particular phase of them. Least of all should excessive significance be attached to theory. Theory may and does affect practice, but often only in moderate degree...it is important to ascertain what customary or written law and philosophic theory have to say on feminine rights and obligations. But it is more important to know whether social practice conforms to theory".[3]

The committee which reported on the status of women in India admitted the difficulty in assessing women's status:

"...the status of women in the Indian context cannot be defined simply. General concepts like equality, role differentiation, legal, social and political rights, dependency or independence, are not applicable to all sections of our population".[4]

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1. Sherry B. Ortner, "Is Female to Male as Nature is to Culture?" in Woman, Culture and Society, edit. by Michelle Z. Rosaldo and Louise Lamphere (Stanford, California: Stanford University Press, 1974), pp.67-87 at p.69.

2. See also Janet Zollinger Giele, "Introduction: The Status of Women in Comparative Perspective", in Women: Roles and Status in Eight Countries, edit. by Janet Zollinger Giele and Audrey Chapman Smock (New York: John Wiley and Sons, 1977), p.4; Martin King Whyte, The Status of Women in Preindustrial Societies (Princeton: New Jersey: Princeton University Press, 1978), pp.27-48.

3. Lowie, Primitive Society, op.cit., p.179.

Footnote 4 continued.....

To assess the legal status of Nigerian women is no less difficult. Wolfe and Witke note that the status of women is elusive,[1] while Kaberry points out that any attempt "by a series of anthropological or moral arithmetic, to decide whether the position of women in general is high or low, or good or bad is...likely to prove profitless".[2]

No attempt is herein made to sift the relevent evidence in order to accord Nigerian married women a definite rung on the fictitious ladder of women's status, which, as Read correctly notes, is "essentially a subjective assessment of numerous and complex factors".[3]

The purpose of this chapter is two-fold.

(1) It attempts to consider, from the data analysed above, certain vital questions:
Do Nigerian marriage laws measure up to the United Nations Charter, anchored in the dignity and worth of the human person, and in the equal rights of men and women; to the Universal Declaration of Human Rights, which with reference to marriage asserts the principle of non-discrimination and proclaims that everyone is entitled to the rights and freedom set forth therein without distinction of any kind, including discrimination on the grounds of sex.[4] More importantly, for the purpose of this thesis, do Nigerian marriage laws conform to the Constitution of the Federal Republic of Nigeria, 1979 which prohibits discrimination on the grounds of

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Footnote 4 continued.....

4. India, Ministry of Education and Social Welfare, Towards Equality: Report of the Committee on the Status of Women in India,(Delhi, 1975), p.7.

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1. Margery Wolf and Roxane Witke, Women in Chinese Society (eds. Stanford: Stanford University Press, 1975), p.1.

2. Kaberry, Women of the Grassfields, op.cti.,p. vii.

3.Read, "Women's Status and Law Reform", op.cit.,p.215; see also Martin King Whyte, The Status of Women in Pre-industrial Societies; Princeton University Press, 1978. pp.10-11.

4. See Universal Declaration of Human Rights, Resolution 503D. (XVI) of the Economic and Social Council at its 736th. Plenary Meeting, 23 July, 1953, art. 16.

sex in the content or practical application of any law in force in Nigeria?[1]

(11) This conclusion also examines the possible future role of law in advancing women's status in marriage and ensuring that the constitutionally guaranteed freedom from discrimination is a reality in fact.

2. Have Nigerian Women Equal Status in Marriage?

To answer this question it is proposed to review briefly the legal evidence of women's status in the various types of marriages discussed above, with reference to particular legal issues of the greatest significance to women's status.

The legal status of Nigerian women in traditional societies is complex and intricately interwoven into the social fabric of the various societies; it is derived from a number of social factors, of which, as shown by the foregoing discussion, the most significant are:

(i) polgamy;
(ii) child-betrothal and child-marriage;
(iii) forced marriage;
(iv) the requirement of parental consent for the validity of a woman's marriage;
(v) the payment of dowry (marriage consideration) as a legal essential of a valid marriage, and its refund as an essential of a valid divorce;
(vi) particular legal incidents of marriage, for example, property rights in some communities, in which women suffer discrimination;
(vii) divorce laws which discriminate against women; and
(viii) inequality with reference to rights of succession to property.

The legal status of women in contemporary Nigeria is further complicated by the application of Islamic law

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1. See Constitution of the Federal Republic of Nigeria, 1979, S.39.

among the substantial proportion of Nigerians who are Moslems, and by the introduction of statutory monogamous marriage and English law, entailing different, and often conflicting rights and obligations, on the spouses. The conflicts produced by monogamous marriage are two-fold.

(1) There is a conflict of legal principles, an obvious example of which is the practice of polygamy, which is permitted under customary[1] and Islamic laws,[2] but prohibited where marriage is contracted under the Nigerian Marriage Act,[3] or in monogamous form outside Nigeria.

Another example of conflict of principles is in the law of succession: under customary law a wife is deprived of any right to inherit from her deceased husband's intestate estate;[4] under Islamic law, she is given one-quarter or one-half (depending on whether the intestate left issue or not);[5] while under the general law the wife of a statutory marriage and her children have exclusive rights of inheritance in her deceased husband's intestate estate.[6] The conflicts are compounded by the practice among Nigerians of combining a statutory marriage with a customary marriage, (a "double-decker marriage").[7]

(11) There is a conflict of jurisdiction. As previously noted, jurisdiction in most matters of marriage and family life depends on the type of marriage contracted. There is a rigid dichotomy of jurisdiction between a customary or Islamic law marriage on the one hand, and a "statutory marriage" on the other. The High Court Laws of the States generally provide that the High Courts shall not exercise original

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1. See further, above Chapter IV.
2. See above, Chapter IX, pp.23-37.
3. See above, Chapter X, pp.127-133
4. See further above, Chapter XIII,pp.430-447
5. See above, Chapter XIII, pp.447-451.
6. Ibid., pp.451-465.
7. See further, Chapter X, pp.155-164.

jurisdiction in any cause or matter which is subject to the jurisdiction of a Customary or Area Court relating to marriage, family status, the guardianship of children, or the inheritance or disposition of property on death.[1] On the other hand, the Matrimonial Causes Decree has conferred exclusive jurisdiction in matrimonial causes on the High Courts of every State in the Federation.[2] The Constitution of the Federal Republic of Nigeria extends this dichotomy in jurisdiction to the appellate level. Customary Courts of Appeal and Sharia Courts of Appeal for any State that requires it may be established to deal with matters relating to customary and Islamic law marriages respectively,[3] with further appeals to the Federal Court of Appeal and the Supreme Court of Nigeria.[4] In the case of a statutory marriage, appeal from a High Court is heard by the Federal Court of Appeal directly and further by the Supreme Court.[5]

Because the types of marriages are not kept strictly separate in practice (a combination is legally permissible),[6] conflicts arise, not only in jurisdiction, but in substantive law, which cannot be readily solved by reference to the law. Judicial attempts to resolve the conflicts are themselves conflicting, which add to the general confusion. An example of this conflict arises where a woman contracts a customary marriage by payment of dowry, and also contracts a statutory marriage, the validity of which is unrelated to the payment of dowry. The question whether a judicial decree of dissolution of the statutory marriage dissolves the customary

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1. See e.g. the High Court Law; Cap.52 of Lagos State, 1973 Revision, s.11(2); High Court Law, Cap.49, Laws of Northern Region of Nigeria, 1963 Revision, s.17; High Court Law, Cap.44, Laws of the Western Region of Nigeria, 1959 Revision, Proviso to s.9(1).
2. See Matrimonial Causes Decree, 1970, s.2.
3. Constitution of the Federal Republic of Nigeria (Enactment) Decree, 1978, ss.245 and 240 respectively.
4. Ibid.,ss.223 and 224; see also s.219.
5. Ibid.,s.219.
6. Marriage Act, Cap.115, Laws of the Federation of Nigeria, 1958 Revision, s.331(1).

marriage also, even though the refund of dowry, a legal essential for a valid divorce under customary law, has not been made, has not yet been authoritatively decided by the Nigerian courts.[1]

(111) Lastly, but by no means least, there is a conflict between the law as expounded by academic legal writers and as adopted by the courts, especially the superior courts, and the law actually practised by the community, a conflict which is central to the assessment of women's legal status. Is women's status to be assessed according to the strict law, which even when it is definite on points, is totally unknown by the average Nigerian woman, or according to the practice of the people? A relevant example concerns the affiliation of children. Many judicial decisions favour the affiliation of a child to its natural father, whereas in many communities, a child is affiliated to the man who has paid dowry with reference to its mother at the time of its conception, regardless of who the actual genitor may be.

These conflicts obviously affect adversely the legal status of women in the modern society.

The significant factors affecting women's position will now be briefly summarised.

(1) Polygamy

Polygyny, under which a man may be married to two or more women at the same time, is legally recognized by both customary[2] and Islamic laws[3] (although in theory a Moslem husband is limited to four wives at any one time, plus one or more concubines). Women may only be married to one husband at a time. The practice of polyandry which was traditionally permitted in certain communities in some parts

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1. See further, above Chapter X.

2. See further, above, Chapter IV.

3. See Chapter IX,pp.28-37.

of the Northern States, has been abolished by local legislation.[1] Where marriage is contracted under the Marriage Act polygamy is prohibited.[2]

Although the available evidence shows a decline in the incidence of polygamy in some parts of the country,[3] its incidence is still significant in other parts of the country, especially among wealthy Moslems in the Northern States.[4]

The recognition of polygyny, but not polyandry, as a legal institution in Nigeria obviously discriminates against women, and conflicts with the freedom from discrimination on the grounds of sex enshrined in the Nigerian Constitution, and also with the Universal Declaration of Human Rights.

(11) Child-betrothal and child-marriage

There is no general legislation prohibiting child-betrothal or child-marriage, although there is some local legislation which attempts to prohibit the practice.[5] Child-betrothal and child-marriage were widely practised in previous generations. In the overwhelming majority of traditional Nigerian Societies, the first marriage of an adult woman was almost unknown, although in most cases cohabitation with the husband was postponed until puberty, usually evidenced by the girl's first menstrual period.

There is evidence of a considerable reduction in the instances of child-marriage in contemporary Nigeria, but the practice still exists to some extent among most

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1. See e.g. Declaration of Borgu Native Law and Custom Relating to Marriage and Divorce, N.A.L.N. 52 of 1961, s.6, which provides: "(1) There shall be no statutory limit to the number of wives a man may have at one time. (2) It shall be an offence for a woman to have more than one husband at a time". See further, above Chapter IV.
2. Marriage Act, Cap.115, Laws of the Federation of Nigeria, 1958 Revision, ss. 27 and 35; see also ss.47 and 48.
3. See further, above, Chapter IV, p.345, Table 4:2.
4. See Chapter IX, pp.28-37.
5. See further, above, Chapter V, pp.386-392 and Chapter IX, pp. 45-46.

communities. The disadvantages of child-marriage, especially where cohabitation with the husband commences before puberty, are many - for example, it reduces the opportunity for girls to be educated, but the most important adverse effect from the point of view of women's legal status in marriage, is the opportunity it provides for forced marriages, or at least for marriages in which the (child) bride's consent can hardly be genuine.

(111) Forced marriage

There is evidence of forced marriage in many traditional Nigerian societies. Child-betrothal and child-marriage invariably give rise to forced marriage, as very often the girl is too young to appreciate fully the true nature of the marriage contract, even though she may formally consent to the union.

There is no general legislation which specifically prohibits forced marriages,[1] but a marriage under the Nigerian Marriage Act is void if contracted after 1 March, 1970, if the consent of either party to it is not a real consent.[2] The Supreme Court of Nigeria has confirmed other judicial decisions that a marriage contracted without the bride's consent is void, and infringes the right of freedom of association enshrined in the Nigerian Constitution.[3]

Although there is evidence of forced marriages occurring in contemporary Nigeria, with the gradual reduction of child-betrothal and child-marriage, and the increase in the number of educated women,[4] forced marriages may eventually disappear from the Nigerian scene.[5]

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1. There are a few local authority bye-laws which provide that a marriage is not valid unless the woman concerned consents to the marriage, see e.g. the Declaration of Idoma Native Law and Custom relating to Marriage and Divorce, N.A.L.N. 63 of 1959, which provides that "No woman shall be married unless she consents to the marriage". Infringement of the law is an offence. See also the Nasarawa Local Administration (Declaration of Afo Native Marriage Law and Custom) Order, 1972, B.P.S.L.A.L.N. 19 of 1972, s.2(b).
2. Matrimonial Causes Decree, 1970, Decree No.18 of 1970, s.3(1)(d).
3. See Osamwonyi v. Osanwonyi [1972] U.I.L.R. 527.
4. See further, Chapter I, pp.103-124.
5. See further, Chapter V, pp.436-447.

(IV) Parental consent

Consent of the woman's father is generally necessary irrespective of her age for a marriage under customary law, if the marriage is contracted by payment of dowry, and under Islamic law as practised by the Moslem communities in Northern Nigeria. Parental consent for the marriage of an adult male is not essential for a valid customary marriage under either customary or Islamic law. Parental consent is necessary for a statutory marriage where either the man or woman is under the age of twenty-one years, although a marriage contracted without parental consent is not rendered invalid.

The requirement of parental consent for a woman's marriage fetters her freedom of choice of a spouse, since her father or other legal guardian has an effective veto against anyone whom she chooses. It may also lead to forced marriage, since the girl, rather than remain unmarried, may feel obliged to accept the man chosen for her. The option of contracting a statutory marriage when she becomes a legal adult at twenty-one years of age may not be practicable: for example, her prospective bridegroom may refuse to contract such a marriage. Although there is need for parental consent when a woman is very young, the retention of parental consent for the validity of the marriage of a woman beyond the age of twenty-one is unsupportable. It infringes the freedom of association granted under the Nigerian Constitution, as well as the right to freedom from discrimination on the grounds of sex. It is directly contrary to the Universal Declaration of Human Rights.

(V) Payment of dowry

The widespread payment of dowry as a legal essential of a valid customary marriage is one of the chief factors which adversely affect the legal status of Nigerian women in marriage. Many other adverse effects, for example, affiliation of children to a man who is not their natural father, can be traced to the retention of dowry as an essential of a valid customary marriage.

There is evidence of a significant increase in the level of dowry payments in some societies, and legislative attempts to peg the payments at a reasonable level have been generally ineffective. The system has deteriorated to such an extent in some areas that it can justifiably be referred to as "wife-purchase".

(VI) Incidents of marriage which discriminate against women

There are certain legal incidents of customary and Moslem marriages in which women suffer discrimination. In customary law, the most relevant example is adultery. Before the introduction of English law, in most customary law systems, a wife's adultery, but not the husband's, was treated as a criminal offence. Although a wife's adultery, generally, is no longer regarded as a crime (except in the Northern States where any extra-marital intercourse is a crime),[1] a wife's adultery is still regarded as an odious "offence" and it attracts degrading penalties, including beating which in at least one recorded case resulted in the death of a wife.

Under Islamic law, a woman may be subjected to seclusion which deprives her of her freedom of movement and association.[2] The practice of idda also discriminates against women, since it curtails a wife's freedom to remarry immediately she has been divorced, whereas no such restriction is imposed on a divorced husband.

(VLL) Divorce

The divorce laws, especially with reference to Islamic law, discriminate against women. While a Moslem husband can divorce his wife in theory, and often does divorce her in actual fact in some parts of the Northern States, indiscriminately, by the mere statement, "I divorce thee" uttered three times, or "I divorce thee irrevocably"

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1. See Penal Code Law, 1960, Cap.89, Laws of the Northern Region of Nigeria, 1963 Revision, ss.387 and 388; see further Chapters VII, p.565 and IX, p.34.

2. See further, Chapter IX,pp.59-67.

once only, the Moslem wife is severely restricted in her freedom to divorce her husband even in cases where a divorce is justified.[1] Under customary law, although a wife's freedom to divorce her husband is unrestricted in theory the requirement of refund of the dowry, without which a divorce is not legally valid, severely restricts her freedom in fact. The husband, on the other hand, is unrestricted in his freedom to effect a divorce in law and in fact.[2]

The wife of a statutory marriage who wishes to divorce her husband is restricted by the high cost of divorce actions in the High Courts of Nigeria at the present time. There is no simple and inexpensive procedure under which a divorce may be effected, even where both spouses mutually agree to the divorce being granted. In a "double-decker" marriage, a wife faces the liability to refund the dowry paid with reference to the customary marriage, as well as the need to obtain a judicial decree of divorce after pursuing a successful action in the High Court, either of which alone may well be beyond her financial capacity.

(VIII) Women's property rights

Women's property rights, especially in the field of intestate succession, are particularly restricted. In some customary law systems a married woman has no legal capacity to own or dispose freely of property she has acquired by her own labour. Such property legally belongs to her husband and is subject to his control. On the other hand, her husband is unrestricted in his capacity to acquire property over which his wife has no control, and which he may

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1. See further, above Chapter IX, pp. 88-89, and pp.98-102.
2. See further above, Chapter VIII, p.562; see also the Nasarawa Local Administration (Declaration of Afo Native Marriage Law and Custom) Order, 1972, B.P.S.L.A.L.N. 19 of 1972, s.7(2) under which a divorced woman may be prevented from remarrying for more than two years; and s.10(2) which provides that in divorce proceedings instituted by a wife, dowry shall be refunded to the husband within one month of the Court's order to repay, "and if payment is not made within this period the court may order her to pay to the husband additional compensation of one pound for every month or part of a month thereafter until the full payment is made".

dispose of freely inter vivos or by will.[1]

With reference to succession, in almost all customary laws, a wife cannot inherit her husband's property or any share of it if he dies intestate, although she may have made significant contributions, such as providing labour in building a house, to the acquisition of the property. In many communities, under customary law, a husband inherits his wife's property if she dies intestate, whether or not she leaves children.[2]

A widow of a customary marriage in most societies has to refund the dowry paid by her deceased husband on the occasion of her marriage before she can remarry, unless she marries a member of the deceased's family. But she cannot compel any member to marry her,or to maintain her, even in cases where the family inherits all the deceased's property. Even her right to remain in the matrimonial home is at best dependent on her "good behaviour", an imprecise and anomalous term which underlies a situation in which the widow's position may be liable to abuse.[3]

Islamic law also discriminates against women in regard to property rights. According to one learned jurist, a woman with reference to rights of succession is treated by Islam as "half a man".

The wife of a statutory marriage is in a better position with regard to rights to property[4] and rights of inheritance,[5] although conflicting judicial decisions have created uncertainty in the laws.[6]

The deficiency in women's property rights has been remedied to some extent by legislation,[7] but discriminatory principles, especially in the law of succession, still remains.

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1. See further above, Chapter XIII,pp.468-469 and 474-479.
2. See further Chapter XIII,pp. 430-447.
3. See above, Chapter XIII, pp. 438-447.
4. See further Chapter XII,pp.369-371.
5. See further Chapter XIII, pp.451 et.al.
6. See Chapter XIIIm pp.479 et.al.
7. For example, Married Women's Property Act, 1882,and Wills Act, 1837, see further Chapter XII.

From this brief summary of the legal status of married women, it is evident that Nigerian women do not have equal rights with men in relation to marriage under customary and Islamic laws. Since the overwhelming majority of women marry under one of these two systems of law, women's legal status in marriage generally is determined by these laws, which as seen discriminate against them in several ways. This has been the traditional position, and although there has been a measure of change in certain respects, women's legal status in marriage still falls far below the standard advocated by the Universal Declaration of Human Rights, and the Constitution of Nigeria, 1979.

3. Proposals for Reform

Granted that Nigerian women do not have equality of rights in marriage and family life, the next question which arises is: is it necessary, or even advisable in the interest of women themselves and the society as a whole, that women should have equal rights and duties with men in the marital relationship? Scholars have shown that from the earliest twilight of human society, every woman (owing to the value attached to her by men, combined with her inferiority in muscular strength), was found in the state of bondage to some man. The subjection of women to men being a universal custom, any departure from it is never comprehended and if suggested it appears unnatural.[1]

One argument used to maintain the status quo in relation to the laws of marriage is that women themselves, especially African women, are happy in this state and do not desire or seek for change. In this connection, Mill notes how difficult it is to apply rational arguments to attitudes that have been deeply-rooted in human beings, especially when these attitudes are supported by reliance on God and nature. Women generally, and African women in particular, will not rebel, for they have been conditioned

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1. See Mill, The Subjection of Women, op.cit., p.230.

to their state since their earliest times, and in many cases they know no other.

Thus the Minister of Internal Affairs in Rhodesia noted:

> "The question of emancipation of African women is a very complex and complicated one. The present position is that 99 percent of African women would find legal emancipation of that nature quite intolerable".[1]

Rousseau asserts:

> "But for her sex, a woman is a man; she has the same organs, the same needs, the same faculties. The machine is the same in its construction; its parts, its working, and its appearance are similar. Regard it as you will the difference is only in degree".[2]

If Roussea is correct in this hypothesis, then why is it that most women in Nigeria would like to become men? The women interviewed for the purpose of this thesis were asked the following question:

> "If you were given an opportunity to be reborn with a free choice of sex, which sex would you like to be born as:
>
> (a) male
> (b) female.
>
> Give reasons for your answer".

Only 4 out of 186 women expressed a desire to be reborn as a female, and strangely enough, three of them were Kanuri women who were in seclusion, the fourth being an Igbo woman of about sixty years of age, who gave as her reason the fact that she had always regretted not having been educated; if reborn as a woman she stated that she would be educated, and would thus be able to do all the things she had been prevented from doing because of her lack of education. The reasons given by the other women are varied and interesting, but the sum total of the reasons given was the women's view of the superior position of men in Nigerian society.

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1. See African Digest, 1968, p.128.
2. Rousseau, Emile, op.cit., p.321.

The desire of African women generally to be men rather than women was commented on by Kingsley in the late nineteenth century. She said:

> "There is no doubt a certain idea among the Negroes that some souls may get a rise in status on their next incarnation. You often hear a woman saying she will be a man next time, a slave he will be a freeman, and so on".[1]

The higher status men occupy in African society, although women's status has improved considerably, has not been entirely changed by the progress of time. The desire of Nigerian women to be men because of the superior status assigned to them is best illustrated from the answers given by the youngest age group who contributed to this research. Primary School children from several areas were given a composition in which they were asked to imagine that a fairy had given them the opportunity to be reborn, but this time they were free to choose whether they would be male or female. They were asked to give reasons for their choice.

The children's answers were extremely interesting, and collectively, give a useful picture of marriage and family life in their particular society. It is not possible to give details of their answers here, but of the 46 boys and 52 girls from two Primary Schools in Enugu who wrote the composition, 44 boys and 49 girls wished to be reborn as males. Among the reasons given for this choice were "in many families boys are preferred to girls, mothers cry and fathers turn away their eyes when a girl is born"; "boys are given better education than girls, women's education ends up in the kitchen"; "a boy can be head of state as our Head of State is"; "most community chiefs and leaders are men"; "where men and women gather together only men can break kola-nuts in ceremonies and other customs"; men do not have to take maternity leave or suffer the disadvantage of pregnancy"; "a man is the head of the family and rules the house"; men do not have to leave their father's compound or change their names"; "even if a man is ugly, if he has

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1. Kingsley, Travels in West Africa, op.cit., p.492.

money he can marry a beautiful woman and make beautiful children"; "in the Bible it is said that Adam came first before Eve, that is why men are stronger than women"; "girls face an uncertain future, unlike the boys, the fear of not getting children and the uncertainty of getting husbands which means everything to them"; men can marry two or more wives, but a woman cannot even marry one"; "according to custom, as a man, if my father dies, the eldest male will take his property, a girl gets nothing".

These are only a few of the many reasons given by the children, but they all show the privileged position which the Nigerian male is considered to enjoy in contemporary Nigerian society. Most important, however, is the fact that the answers of both the women interviewed, and the girls who wrote the composition, reveal that they are aware of the better legal and social status of Nigerian men, which if given the opportunity, they would wish to enjoy.

However true the assertion of the Rhodesian Minister quoted, that African women would object to a change in legal status, may be for African women in Rhodesia, it does not seem equally true of Nigerian women, who are now beginning to assert their rights, and to challenge the legal and social structure which deny them rights granted to their male counterparts. The absence of organized feminine liberation movements in Nigeria should not be taken as evidence that Nigerian women are satisfied with the superior legal position enjoyed by men generally. The struggle for equality need not take the form of physical confrontation. Nigerian women are presently occupied in improving their economic and educational status, which would eventually lead to equality of legal status in actual practice.

What can law do to improve the status of women, in relation to marriage, which is basically a very personal relationship?

The function of law as a vehicle of social reform is limited. No regulation, however good, can ensure a happy marriage, or equality of treatment of women in the marital relationship, but law is a potent factor in influencing

public opinion, and sets a standard upon which people can pattern their behaviour.

Nigerian society has changed from its traditional pattern; in many cases Nigerian customary and Islamic laws remain unchanged, so that there is a disparity between legal theory and actual practice. New economic conditions, growing individualism, and a change from the social pattern of large extended families to smaller nuclear families necessitate a change in family laws if women are to be adequately provided for.

One of the purposes of this research was to gain information as to what role society thinks Nigerian women ought to play in the future. Answers collected indicate that most people consider that the legal status of Nigerian women is relatively good, but that it can be improved, and that total equality, as far as is physically possible, should be the ultimate goal.

With the answers given in mind proposals for reform in particular aspects of the law relating to marriage have been proposed throughout the thesis. A brief reiteration of the main proposals will not, however, be amiss here.

The following reforms are suggested:

(1) Legislation specifying a national minimum age for all types of marriages in Nigeria should be enacted, and it is recommended that such age should not be lower than sixteen years for males and females. It is realised that child-marriages would not be entirely eliminated by legislative fiat alone, for culture and religious pressures are still strong in many areas, but legislation in this respect, together with the increased educational opportunities for women provided by the Federal Government's Universal Free Education, would help considerably in the reduction of child-marriage.

(11) Forced marriage at any age should be completely abolished by legislation throughout the Federation, and in all types of marriage, including marriage according to Islamic law. A statutory marriage contracted without the real consent of either party is void at present. This provision should be extended to all types of marriage.

(111) To protect young people from rash decisions which may be harmful to their best interests, parental consent for a person under the age of twenty-one should be retained. Parental consent should not be necessary for the validity of the marriage of any person, male or female, who is aged twenty-one or above. This principle should apply not only to statutory marriages, but to all types of marriage. Reference may be made here to the Report of the Commission on the Law of Marriage and Divorce in Kenya, 1968[1] and the draft Bill it prepared for the reform and integration of Kenya's law relating to marriage and allied matters.[2]

(IV) The payment of dowry should be rendered legally ineffective. The payment of dowry or other monetary consideration to the bride's parents, by or on behalf of the bridegroom, should no longer be a legal necessity for a valid marriage of any type contracted in Nigeria, neither should the refund of money or property given in this respect, be essential for a valid divorce.

No action, whether in contract or otherwise, involving the payment or refund of dowry should be entertained by Nigerian courts. This recommendation is in line

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1. Recommendation No. 20. par. 98 reads:
"While we think parental advice is always desirable, regardless of age, we do not think it would be reasonable to make parental consent a legal requirement where a person is over 21 years of age. We think it a proper requirement up to that age, even thougn we are recommending that 18 should be the age of majority. We see nothing illogical in this. A person of 18 may well be old enough to enter into ordinary contracts but marriage is a very special kind of contract which may affect the whole course of a person's life, and one which calls for maturity of judgement more than intelligence".

2. See the Bill of the Law of Matrimony Act, 196, s.25:
'25.(1) A person who has not completed his or her twenty-first year shall, notwithstanding that he or she shall have attained the age of majority as prescribed by the Age of Majority Act 196 . nevertheless be required, before marrying to obtain the consent -
(a) of his or her father; or
(b) if his or her father is dead of his or her mother; or

Requirement of consent

footnote 2 continued.....

with Tanzania's Law of Marriage Act, 1971,[1] under which a marriage may be valid notwithstanding failure to comply with any custom regarding dowry or exchange of gifts.[2]

(V) Cohabitation is not a legal essential of a valid statutory marriage. Similarly, it should not be a legal essential of a valid customary marriage. Cohabitation should be treated as a matter of evidence of a valid marriage.

(VI) At present a system of central registration of all statutory marriages celebrated in Nigeria exists.[3] Customary marriages, on the other hand, are registrable locally, but registration is not compulsory, in some communities,[4] and many customary marriages remain unregistered, and consequently difficult to prove, when the occasion arises.[5] The system of central, compulsory registration should be

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Footnote 2 continued....

(c) if both his or her father and mother died before he or she attained the age of eighteen years, of the person who was his or her guardian immediately before he or she attained that age.

but in any other case, or if all those persons are dead, shall not require consent.

(2) Where the court is satisfied that the consent of any person to a proposed marriage is being withheld unreasonably or that it is impracticable to obtain such consent, the court may, on application, give consent and such consent shall have the same effect as if it had been given by the person whose consent was required by subsection (1).

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1. Act No. 5 of 1971.

2. See Read, "Marriage and Divorce in Tanzania", [1972] J.A.L. op.cit., p.29; See also Ghai, "The New Marriage Law in Tanzania", op.cit.,p.104 "The White Paper said that many young men are not able to marry because they do not have enough money or livestock to pay the dowry demanded by the girl's family...As a result young couples elope and then live together as husband and wife even if they are not properly married". Cf. the position in Nigeria, see Bride Price Committee Report, op.cit.

3. See Marriage Act, Cap.115, Laws of the Federation of Nigeria, 1958 Revision, s.30.

4. See e.g. the Local Government Law, Cap.79, Law of Eastern Nigeria, 1963 Revision, ss.84 and 90, which authorizes local authorities to make bye-laws for the registration of customary law marriages within their jurisdiction.

footnotes 4 and 5 continued.....

extended to all types of marriages. Comparison can be made with Tanzania's Law of Marriage Act, 1971, which provides for the recording of all types of marriages, by whatever form they are contracted in a single system of registration under the control of the Registrar General.[1]

(VII) A husband should be liable for the maintenance of his wife in all types of marriage, not only during the subsistence of the marriage, but in the discretion of the judges and where necessary after a divorce has been granted. A wife whose husband cannot provide for himself should similarly be liable for his maintenance.

(VIII) The procedure for obtaining a divorce from a statutory marriage should be simplified. Uncontested divorce suits could be heard in Magistrates Courts, thus relieving the pressure of work in the Higher Courts. Procedure for divorce, and grounds for divorce, should apply equally in cases of divorce by either husbands or wives. Once a marriage of any type has broken down irretrievably, a divorce should be granted to either spouse.

(IX) Equality of property rights between husband and wife should be the cardinal principle of Nigerian matrimonial property law. A wife should be given a share in her husband's property if she has contributed to its acquisition or improvement; or if she has made significant contribution to the

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Footnotes 4 and 5 continued....

4....Most of such bye-laws already made do not make registration compulsory. Cf. the Registration of Marriages Adoptive Bye-Law Order, 1956, W.R.L.N.4 of 1957, under which registration of a customary law marriage is compulsory; see generally Nwogugu, Family Law in Nigeria, op.cit., pp.54-56.

5. See e.g. Agongo v. Aseleke and Ors. [1967] N.M.L.R.21; Lawall v. Younan [1961] W.N.L.R.245; Abisogun v. Abisogun [1963] 1 All N.L.R.237; Ibokwe and Anor. v. U.C.H.Board of Management [1961] W.N.L.R.173. See also Kasunmu, "Proof of Polygamous Marriage in Nigerian High Courts", Journal of Int. and Comp. Law, 1969, pp.27 -

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1. See Read, "Marriage and Divorce in Tanzania", op.cit., pp.29-30.

general welfare of the family during the subsistence of the marriage.

(X) In all types of marriage, the surviving spouse should be given a share in the intestate estate of the deceased spouse, and there should be no discrimination in this respect between husband and wife.

(XI) The present position whereby a husband or a wife could dispose of his or her property by will, leaving his or her spouse and children destitute, should be remedied by a provision enabling a court in its discretion to order the payment of maintenance for a surviving spouse who needs such maintenance, and for the dependent children of the marriage.[1]

The Nigerian Constitution, 1979[2] has set the framework for a revolution in relation to equal rights for the Nigerian women. It provides:

> "39.-(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, religion, sex or political opinion shall not, by reason only that he is such a person -
>
> (a) be subjected either expressly by, or in the practical application of any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places or origin, sex, religion, or political opinions are not made subject; or
>
> (b) be accorded either expressly by, or in the practical application of any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions".

The above suggestions for legislative reforms should go a long way to making the revolution a reality in fact as it now is in law.

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1. See further, above, Chapter XIII, pp.495-496.

2. Federal Republic of Nigeria (Enactment) Decree, 1978 Decree, No. 25 of 1978, s.39(1).

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